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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

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37 pp

(DEATH PENALTY CASE)

QUESTIONS PRESENTED

1. Does the creation of an exception which allows piecemeal review in the federal courts of the guilt phase of respondent's capital trial while an automatic appeal of his penalty phase retrial is still before the State Supreme Court violate the well-established rules of comity and abstention which previously have precluded federal intervention in state criminal cases before those proceedings have been completed?

2. Can a federal circuit court make valid findings of either "extraordinary delay" or "exceptional circumstances of particular urgency" to reject the rules of comity and abstention in a state capital case without first considering a comprehensive record of the proceedings before the state courts and in the absence of any factual record supporting these findings?

3. Can a finding of "extraordinary delay" to permit federal court intervention into a state capital case in which the penalty phase retrial is presently before the State Supreme Court be based solely on the fact that 15 years had elapsed before the defendant's sentence had finally been resolved when a majority of time spent on the case was the result of the defendant's own dilatory tactics?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95 -

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing the order of the United States District Court for the Eastern District of California dismissing without prejudice respondent's petition for writ of habeas corpus challenging his guilt trial on the grounds (1) of abstention, and (2) failure to exhaust state remedies since the automatic appeal of the penalty phase retrial was already pending in the California Supreme Court.

OPINIONS BELOW

In a case which had been pending before the Ninth Circuit for more than three years, the Ninth Circuit on May 26, 1995, issued an opinion reversing the dismissal order of the United States District Court for the Eastern District of California and reinstating respondent's petition for writ of habeas corpus challenging his guilt trial in that District Court, on the grounds of the extraordinary delay respondent faced if

forced to wait until the automatic appeal of his penalty phase retrial is resolved in the state courts before being able to challenge the guilt trial in the federal courts. The Ninth Circuit held that respondent "should not be required to wait more than fifteen years for his sentence to be finally resolved before he may challenge the constitutionality of his conviction." *Phillips v. Vasquez*, 56 F.3d 1030; Appendix A.

STATEMENT OF JURISDICTION

This Court has jurisdiction under sections 1651, subdivision (a), and 2254, of Title 28 of the United States Code and Rule 20.1 of the United States Supreme Court Rules.

CONSTITUTIONS, STATUTES OR REGULATIONS

28 United States Code section 2254.

STATEMENT OF THE CASE

A. Facts of the Crime

On December 7, 1977, respondent lured building contractors Rose and Bartulis to a remote area in Madera County, ostensibly to purchase stolen insulation. There, respondent shot the two men, took their wallets, poured gasoline over them, and set them on fire with matches he had borrowed from them earlier. When Rose fled, on fire, respondent ran over him and drove off. Rose lived but Bartulis did not. Respondent

was arrested in Utah on March 17, 1978, and, while awaiting extradition, he mailed out a hit list with detailed instructions to kill Rose, respondent's witness-girlfriend, respondent's best friend, and respondent's own mother who could blow his putative alibi. *People v. Phillips*, 41 Cal.3d 29, 39-42, 75-77, 222 Cal.Rptr. 127, 711 P.2d 423 (1985).

B. Procedural Background[1/]

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1. Because of the unique procedural history of this case, the Ninth Circuit issued its novel opinion without an accurate presentation of the factual record. Thus, the opinion in this case is neither supported by any facts nor is it reflective of the actual facts. As will be shown *infra*, before respondent's automatic appeal from his penalty retrial could be ruled on by the California Supreme Court, respondent filed a habeas corpus petition in the District Court, raising only guilt phase issues. The court denied the petition before petitioner could even respond and lodge copies of the relevant record. The Ninth Circuit, after granting a certificate of probable cause to appeal, initially questioned whether it had jurisdiction to proceed and asked for briefing on the issue. When no briefing was forthcoming, the Ninth Circuit issued an order to show cause and had both parties answer three questions, none of which addressed the issue of delay. After the issuance of the Ninth Circuit's opinion reversing the district court's denial of the habeas corpus petition, petitioner sought rehearing. This was the first instance which petitioner had to brief the issue of delay. Petitioner also attempted to lodge with the Ninth Circuit the relevant documents to show what actually took place procedurally between respondent's first capital trial and

1. **Direct Appeal**

A jury convicted respondent of the 1977 murder of Bartulis during the course of robbery and sentenced him to death. *People v. Phillips*, *supra*, 41 Cal.3d 29. Appeal to the California Supreme Court is automatic. *Id.* at 38. Date of sentence was February 20, 1980. After the case was briefed on appeal and orally argued on October 4, 1982, the California Supreme Court on February 23, 1984, requested supplemental briefing, which formed the basis for the December 31, 1985,

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his penalty retrial. Apparently uninterested in the actual facts dealing with the procedural history of this complex case, the Motion to Lodge Documents was denied, and the petition for rehearing was denied. Petitioner is filing an accompanying motion for judicial notice and to lodge those same documents with this Court; they are too voluminous to utilize making them part of the appendix. If this Court grants certiorari and petitioner's motion to lodge, in any brief on the merits, the lodged documents will be referred to by their respective item numbers under the Notice of Lodging (N.L.), with the exception that Items 1-7, the seven volume Clerk's Transcript from the penalty retrial, which will be referred to as "CT" and the appropriate sequential page number. Also, Item 11, a draft of the Statement of the Case at respondent's penalty retrial, has been expanded to include a draft of the Statement of Facts from that retrial. An additional item, Item 16, shows the latest developments in the trial record certification process. Petitioner will refer to the expanded Item 11 to show respondent has not been prejudiced by the delay and that he is in fact responsible for much of the delay.

penalty reversal. Appendix V at 4-6; *People v. Phillips*, *supra*, 41 Cal.3d at 84.

2. **Penalty Retrial**

The hearing on the remittitur was on March 7, 1986. It is important to note that it is Respondent Phillips who personally waived time for his penalty phase retrial rather than requesting a speedy retrial. Thereafter, respondent -- who eventually achieved co-counsel status -- filed a series of motions, including several state habeas corpus petitions, that repeatedly delayed the originally scheduled October 27, 1986, retrial. The actual retrial did not commence until September 23, 1991, and respondent was again sentenced to death on March 13, 1992. Appendix U at 3-26; Appendix V at 6-13. Appeal to the California Supreme Court is again automatic. *People v. Phillips*, *supra*, 41 Cal.3d at 38.

3. **Second Direct Appeal**

Counsel for respondent on direct appeal, Donald J. Horvath -- who is also advisory counsel to respondent in the instant Ninth Circuit proceedings at issue -- had received at least 10 extensions of time to seek corrections to the record of the second penalty trial. This was because respondent had done something unique; he tape recorded his entire penalty retrial and appellate counsel had the time consuming task of comparing the tapes with the typed transcripts.[2/]

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2. Thereafter the state had to await copies of the tapes as furnished by counsel Horvath and then check the suggested record corrections with the tapes and the

Appendix F; Appendix Q at 2-4; Appendix U at 28-30; Appendix V at 17-18.

4. State Habeas Corpus

According to respondent's habeas corpus petition filed in the United States District Court for the Eastern District (Appendix M),[3] respondent filed some six habeas corpus petitions and one habeas corpus appeal in the state courts between April 1988 and September 1991. There were at least two evidentiary hearings and one full blown appellate court briefing. All petitions and the one appeal were denied. Appendix M at 3 - 19; Appendix V at 13-14.

5. Federal Habeas Corpus

On March 4, 1992, respondent filed a petition for writ of habeas corpus in the Federal District Court for the Eastern District pursuant to 28 U.S.C. § 2254. Appendix N at 2.[4] On March 12, 1992, the petition was denied without prejudice, the court noting that

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transcripts, and had not yet completed this task when the Petition for Rehearing and Suggestion for Rehearing en Banc was filed in the Ninth Circuit. Appendix V at 17-18.

3. Because the actual claims on federal habeas corpus are irrelevant to this petition, petitioner includes the petition as Appendix M, but not the accompanying Brief in Support of Petition for Writ of Habeas Corpus.

4. This is the District Court docket sheet for respondent's habeas corpus case.

respondent was not to be sentenced until March 13, 1992. The court declined to interfere with ongoing state criminal proceedings on abstention grounds and further found respondent had failed to exhaust in the state's highest court. Appendix B at 2-4; Appendix N at 2. On May 14, 1992, the District Court denied respondent's request for a certificate of probable cause to appeal. Appendix C. On June 18, 1992, the Ninth Circuit granted respondent's request for a certificate of probable cause. Appendix D. On August 26, 1992, the Ninth Circuit set briefing schedule. Appendix E. On October 1, 1992, attorney Donald Horvath was appointed as advisory counsel to respondent and ordered to file a brief within 60 days on the question of whether the appeal should be dismissed for lack of exhaustion. Petitioner was given the option of responding within 21 days of receipt of that brief. Appendix F. On October 16, 1992, the former briefing schedule set August 26, 1992, was cancelled deferring to the schedule set on October 1, 1992. Appendix G. On December 2, 1993 -- no brief by respondent's counsel having been filed as ordered on October 1, 1992 -- the Ninth Circuit issued an order to show cause directing that three questions be answered within 30 days of receipt of the order. The questions were:

> "(1) Each shall report on the status of any proceedings in respect to Richard Phillips convictions and sentence of death pending in the courts of the State of California.
>
> "(2) Why should not this appeal be dismissed without prejudice as premature in that all proceedings in the state court had not been exhausted as of the time the petition was filed?
>
> "(3) Why should not Richard Phillips make application in the state court for any

materials, computer investigations, etc. needed in aid of his appeals and habeas corpus review until a petition for habeas corpus is properly before this court?" Appendix H.

Petitioner filed an Appellee's Return to Order to Show Cause on December 27, 1993. Appendix O. Respondent filed a Petitioner's Response to Order to Show Cause. Appendix P. Counsel Horvath filed a Response to Order to Show Cause. Appendix Q. Oral argument was on October 11, 1994. Appendix I.[5/] Respondent filed a supplemental brief following argument, with a cover letter dated February 15, 1995. Appendix S. By letter dated April 4, 1995, respondent's counsel Horvath informed the court he was enclosing docket sheets from the trial court as to the trial, and from the California Court of Appeal, Fifth Appellate District, as to two habeas corpus petitions filed therein, in response to the court's request for further information. Appendix T.[6/] On May 26, 1995, the Ninth Circuit

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5. Prior to oral argument, petitioner by letter dated July 29, 1994, cited additional authorities for oral argument. Appendix R-1. Respondent, by letter dated August 28, 1994, addressed the additional authorities. Appendix R-2.

6. The trial court docket sheets -- on penalty retrial only -- are Appendix U. They are extremely cursory. The relevant items in Appendix U are all contained in N.L. -- Items 1-8 (CT), the more complete Clerk's Transcript. Before the Ninth Circuit had obtained the docket sheets from counsel Horvath, petitioner had, at that court's telephonic request, duplicated the entire clerk's transcript from respondent's penalty retrial for the court. Before the transcripts could be mailed, the court by telephone cancelled the request.

issued its opinion reversing the dismissal of the federal habeas corpus petition by the District Court and reinstating the petition. Appendix A. On June 8, 1995, petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc in the Ninth Circuit. Appendix V. On June 30, 1995, the Ninth Circuit directed respondent and his advisory counsel to respond to the petition for rehearing. Appendix J. Responses were filed by respondent (Appendix W) and his advisory counsel. Appendix X. On July 18, 1995, petitioner mailed a cover letter (Appendix Y-1) and Notice of Lodging (Appendix Y-2) along with copies of the Clerk's Transcript of respondent's penalty retrial, California Supreme Court docket sheets for respondent's two capital appeals, a request from the California Supreme Court for supplemental briefing in respondent's first capital appeal, respondent's request for correction of the record in his second capital appeal, petitioner's limited informal response, and petitioner's letter to the state trial court indicating completion of the review of respondent's request to correct the trial transcript.[7] Respondent's advisory counsel objected. Appendix Z. On July 24, 1995, petitioner faxed a Motion to Lodge those documents that accompanied the Notice of Lodging to the Ninth Circuit. Appendix Y-3. The motion was opposed by respondent (Appendix AA) and his advisory counsel. Appendix BB. On August 7, 1995, the motion to lodge documents was denied by the Ninth Circuit. Appendix K. On September 14, 1995, the Ninth Circuit denied petitioner's petition for rehearing and suggestion for rehearing en banc. Appendix L.

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7. Accompanying the instant petition is a Motion for Judicial Notice and to Lodge those same documents with this Court. See fn. 1, *supra*.

6. The Ninth Circuit's Published Reversal

In its published reversal of May 26, 1995, the Ninth Circuit ruled that requiring respondent to wait more than 15 years to have the federal courts consider his challenge to the guilt phase of his capital trial was too long. This finding of "extraordinary delay" was based on a simplistic analysis which considered only (1) that respondent had been convicted in 1980, (2) that the California Supreme Court reversed the death penalty and affirmed the guilt conviction in 1985, and (3) that respondent had not been resentenced to death until 1992, and finally, (4) that his automatic appeal from the penalty phase retrial was still pending before the California Supreme Court. This combination of facts, without any detailed analysis, was enough for the Ninth Circuit. The Ninth Circuit found that the guilt phase conviction was final in the California Supreme Court, and, according to respondent, was fully and completely exhausted. The Ninth Circuit ruled that after such a long passage of time, and with no foreseeable date for the resolution of the penalty phase retrial by the California Supreme Court, respondent could now challenge his guilt conviction in the federal courts while the automatic appeal of his penalty retrial was still pending before the California Supreme Court. Appendix A.

The Warden of San Quentin Prison and the Attorney General of the State of California petition for certiorari to correct the Ninth Circuit's unsupported and unwarranted finding of finality and extraordinary delay and the Ninth Circuit's order permitting respondent to challenge his guilt conviction on federal habeas corpus while the automatic appeal of the penalty phase retrial is still pending before the California Supreme Court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the opinion of the Ninth Circuit establishes a dangerous precedent which will allow the District Courts across the country to intrude into pending state capital cases. Few would dispute the axiom that capital cases are more complex and take more time to resolve than ordinary criminal cases. It is equally beyond dispute that delay is the hallmark of the defense in these difficult cases. Under the ruling of the Ninth Circuit, in a capital case wherein the guilt phase is affirmed on appeal and the death penalty is reversed to later be retried, the mere passage of time will permit a capital defendant to bifurcate the case and challenge his guilt trial in the federal courts while the penalty trial is still pending final resolution in the state courts. There is simply no support whatever for a rule establishing fifteen years as a per se showing of presumptively prejudicial extraordinary delay. Rather than advancing the prompt resolution of these already difficult cases, the rule announced by the Ninth Circuit actually rewards a defendant for delaying the resolution of the penalty retrial.

This misconception of delay totally ignores the fact that criminal defendants in capital cases generally do all they can to stall their case and take as long as possible to prevent final resolution in the state courts, as did and does respondent herein. More importantly, to permit a simultaneous challenge to the guilt conviction in the federal courts while the penalty phase appeal is still pending in the state courts is a significant affront to the comity traditionally afforded state court proceedings. Permitting this unwarranted intrusion by the Federal Courts into the orderly state appellate procedures will

additionally create the likelihood of expensive piecemeal litigation and undermines the doctrine of abstention in deference to first obtaining finality of state court proceedings as espoused in *Judice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, S.L.Ed 376 (1977); *Huffman v. Pursue, Ltd.* 420 U.S. 592, 93 S.Ct. 1200, 43 L.Ed.2d 482 (1974) and *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 Ed.2d 669 (1971).

To add insult to injury, the purported finding of extraordinary delay is particularly egregious in this case since it was made by an appellate court which was acting without benefit of a full and accurate record. Once the full record is considered, there is simply no evidence to support the putative finding of extraordinary delay by the state.

In short, there is no factual, legal or public policy basis supporting the decision of the Ninth Circuit.

ARGUMENT

I.

PERMITTING A CAPITALLY CONVICTED DEFENDANT TO CHALLENGE HIS GUILT CONVICTION IN THE FEDERAL COURTS ON HABEAS CORPUS WHILE HIS PENALTY PHASE RETRIAL IS STILL PENDING ON APPEAL IN THE STATE COURT IS AN AFFRONT TO THE TRADITIONAL RULES OF COMITY AND ABSTENTION, ESPECIALLY SINCE THE FINDING OF PRESUMPTIVELY PREJUDICIAL EXTRAORDINARY DELAY IN THE STATE PROCEEDINGS IS DEVOID OF ANY FACTUAL SUPPORT

In what appeared to be a routine decision, the District Court dismissed respondent's habeas corpus petition without prejudice, declining to interfere with ongoing state capital murder proceedings on abstention grounds, citing to *Younger v. Harris*, 401 U.S. 37 (1971), *Huffman v. Pursue Ltd.*, 420 U.S. 592, 609 (1975) and *Judice v. Vail*, 430 U.S. 327, 348 (1977). Appendix B at 3. The District Court also found failure to exhaust since respondent's death sentence had not yet been imposed or reviewed by the state courts[8], citing to 28 U.S.C. § 2254 (b)-(c)[9] and *Rose v. Lundy*, 455 U.S. 509 (1982).

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8. As the District Court noted, respondent filed his *pro se* petition for writ of habeas corpus on March 4, 1992. Appendix B at 2. Respondent was not sentenced to death, following his penalty retrial, until March 13, 1992. Appendix B at 2; Appendix V at 13.

9. Section 2254(b)-(c) states:

Appendix B at 3-4. The District Court took this action sua sponte without requesting briefing or receiving any factual record from the Attorney General.

With a non-existent record the Ninth Circuit reversed the District Court, and found that under California law, the guilt phase of respondent's capital case was final, and that only the penalty phase appeal following penalty retrial was pending in the state courts. More remarkably, the Ninth Circuit found that the almost 15-year period since his conviction, with still more time yet to be taken in the resolution of his automatic appeal from his penalty phase retrial, was just too long and constituted extraordinary delay.[10/] Without any

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"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

10. The Ninth Circuit inflated the alleged delay by looking to the time from the date of the original death sentence (February 20, 1980) to calculate the 15-year delay. In actuality the first opportunity which respondent would have had to go to federal court to challenge his

real examination of the record in this case, two of the circuit judges amazingly characterized the delay as "extraordinary" and found that the delay rendered the state corrective processes "ineffective" within the meaning of section 2254(b), excusing exhaustion and rendering abstention under *Younger v. Harris* inapplicable. Appendix A at 5809-5814. The concurring circuit judge, while agreeing that section 2254(b) was applicable, also found *Younger v. Harris* to apply, but found the length of the delay constituted an unusual circumstance exception to the ordinary rules of comity and exhaustion. Appendix A at 5815-5817. The Ninth Circuit opinion further held that the delay was presumed to have been prejudicial to the opportunity for a fair retrial of the guilt phase. Appendix A at 5809-5810.

As noted in Argument II, *infra*, the Ninth Circuit's finding that the guilt phase was final under California law is wrong, as is the factual finding of presumptively prejudicial extraordinary delay. These findings were erroneous when considered as either rendering the state corrective process ineffective under section 2254(b) and rendering abstention under *Younger v. Harris* inapplicable, or when used to establish an unusual circumstance exception to *Younger v. Harris*.

In discussing *Younger v. Harris*, *supra*, 401 U.S. 37, and abstention, Judge Kleinfeld, in his concurring opinion, stated that *Younger* abstention applied until the

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guilt conviction would not have arisen until the California Supreme Court issued a remittitur upon completion of his first automatic appeal. The remittitur was issued in February of 1986. Thus, any delay in respondent's opportunity to seek federal court review of his guilt phase conviction is less than 10 years [1986 until 1995] rather than more than 15 years [1980 until 1995].

judgment was final in the state court and that final meant sentence was final. Finality of one issue was not enough. Appendix A at 5815-5816.[11]

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11. The majority's disagreement with Judge Kleinfeld's discussion on abstention and citation of *Brady v. Maryland*, 373 U.S. 83 (1963) that final judgment does not always mean sentence (Appendix A at 5806 continuing fn. 2), is misplaced. Brady was convicted of capital murder. After his conviction and sentence were affirmed on appeal by the Maryland Court of Appeals he learned that an extrajudicial statement of his separately tried codefendant admitting to the actual killing had been withheld from the defense at trial. On post conviction relief, the Maryland Court of Appeals found this to be prejudicial error and remanded the case for retrial on the issue of penalty, but not guilt. Brady petitioned this Court for certiorari. Therein, this Court stated,

> Neither party suggests that the decision below is not a "final judgment" within the meaning of 25 U.S.C. § 1257 (3), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that "Final judgment in a criminal case means sentence. The sentence is the judgment" (*Berman v. United States*, 302 U.S. 211, 212) cannot be applied here. If in fact the Fourteenth Amendment entitled petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt "that presents a serious and unsettled question" (*Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 547) that "is fundamental to the further conduct of the

As noted by Judge Kleinfeld,

> In *Younger*, the Supreme Court held that federal courts generally may not enjoin ongoing state criminal proceedings, but leaves room for possible exceptions to the general rule for "bad faith, harassment, or other unusual circumstance that would call for equitable relief." *Id.* at 54.

Appendix A at 5815.[12/] In a somewhat similar vein,

> case" (*United States v. General Motors Corp.*, 323 U.S. 373, 377). This question is "independent of, and unaffected by" (*Radio Station WOW v. Johnson*, 326 U.S. 120, 126) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See *Largent v. Texas*, 318 U.S. 418, 421-422. CF. *Local No. 438 v. Curry*, 471 U.S. 542, 549.

Id. at 85 fn. 1

It is patent that under the unique procedural posture of that case, the general rule that final judgment meant sentence had to give way to Brady's due process rights as to the posture of his new trial. Respondent's case does not call for a similar disregard for the general rule that final judgment means sentence.

12. In *Younger v. Harris*, *supra*, 401 U.S. 37, this Court actually stated at page 54,

> Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be. It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute "on its face" does not in itself justify an injunction against good-faith attempts to enforce it, and

in *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) this Court noted

> that comity was the basis of the exhaustion doctrine: "it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist.'"

Id. at 515-516, quoting from *Ex Parte Hawk*, 321 U.S. 114, 117 (1944).

According to the Ninth Circuit, in cases where exceptional or unusual circumstances are shown to be present, the doctrine of abstention under comity may be excused and federal courts may intervene in pending state proceedings prior to their state finality. As pointed out in Argument II, *infra*, there is simply no accurate record supporting a finding of unusual or exceptional circumstances in this case. To the contrary, it is regrettable but true that as most capital cases involving a penalty retrial go, the instant case is more typical than unusual. Admittedly, respondent's capital appeal is still

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> that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief. Because our holding rests on the absence of the factors necessary under equitable principles to justify federal intervention, we have no occasion to consider whether 28 U.S.C. § 2283, which prohibits an injunction against state court proceedings "except as expressly authorized by Act of Congress" would in and of itself be controlling under the circumstances of this case.

pending in the State Supreme Court and his death sentence is not yet final. This does not mean, however, he should be permitted to litigate a portion -- the guilt phase only -- of that case at the same time in the federal courts.

The Ninth Circuit has attempted to characterize the holding in this case as "limited" and "narrow." There is an implied suggestion that the holding in this case will not have any effect beyond this one case. Nothing could be farther from the truth. The situation presented in this case is neither unique to California nor unique within the other states with death penalty statutes. For a myriad of reasons, capital cases have become unnecessarily protracted and complex, especially when they reach the appellate courts. Allowing these cases to become further fragmented and splintered, with both the federal and state courts simultaneously reviewing different aspects of case, is an absurd way of solving the problem.[13/]

Any claim that there is precedent for this bifurcation of proceedings in the state and federal courts simultaneously by citing to *Burris v. Farley*, 51 F.3d 655 (7th Cir. 1995) (Appendix A at 5813-5814) is likewise misplaced. While it is true that Burris did challenge the guilt phase of his conviction in the federal courts while the penalty phase was still on state appeal following a new penalty trial, it is patent that this only occurred because for some undetermined reason, the State of Indiana did not object. In fact, at the hearing in the

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13. The specter of both court systems issuing discovery orders which inevitably will conflict with one another, the prospect of duplicative funding requests, and the issuance conflicting scheduling and briefing deadlines is hardly the model of efficiency.

District Court on the habeas corpus petition "the Attorney General [of Indiana] waived any arguments based on the exhaustion of state remedies," and the District Court accordingly declined to "consider the ramifications of this issue." *Burris v. Farley*, 845 F.Supp.636 (N.D. Ind. 1994). A reading of the entire opinion indicates that abstention under comity was never raised or discussed. *Id.* at 636-665. Thus, *Burris v. Farley*, *supra*, 51 F.3d 655 can hardly be deemed authority supporting a new and unique rule allowing bifurcation of a capital case in federal and state courts at the same time simply because the defendant has been able to delay finality for fifteen years. Such a peculiar precedent appears to reward delay rather than discouraging it.

This bifurcation of proceedings in both state and federal courts lends itself to further mischief: piecemeal litigation, e.g. *Rose v. Lundy*, *supra*, 455 U.S. at 520-521; *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). It is indeed ironic that while Congress struggles with legislative efforts to streamline federal habeas, the Ninth Circuit is busy creating exceptions which will have the inevitable result of making the process more cumbersome and expensive. The established practice of using one federal habeas corpus petition to raise all federal challenges to both guilt and penalty remains far more preferable and efficient.

Lastly, petitioner would note this Court's opinion of *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct.617, 88 L.Ed.2d 598 (1986). In that case when it arose in the District Court, the State argued that Hillery had waited too long to challenge the racial make-up of the grand jury that had indicted him, claiming he should have filed his federal habeas corpus petition after his guilt conviction was affirmed, the penalty being reversed and

a new penalty trial ordered instead of waiting until the finality of the penalty phase. In rejecting the State's position, District Court Judge Karlton, stated,

> Although the California Supreme Court affirmed the guilt phase of petitioner's conviction in 1965, it reversed the death penalty imposed and remanded to the trial court for further proceedings. *People v. Hillery*, *supra*, at 713, 44 Cal.Rptr. 30, 401 P.2d 382. The appeal from the second penalty trial was not completed until 1967. *People v. Hillery* (1967) 65 Cal.2d 795, 56 Cal.Rptr. 280, 423 P.2d 208, *cert. denied*, 389 U.S. 986, 88 S.Ct. 486, 19 L.Ed.2d 496 (1968). In 1969, by writ, petitioner was successful in securing the reversal of the second penalty trial because of *Witherspoon* error. *In re Hillery* (1969) 71 Cal.2d 857, 79 Cal.Rptr. 733, 457 P.2d 565. At his third penalty trial, petitioner once again received the death penalty. In 1974, on automatic appeal to the California Supreme Court, the Court modified the penalty to life imprisonment. *People v. Hillery* (1974) 10 Cal.3d 897, 112 Cal.Rptr. 524, 519 P.2d 572. <u>This protracted litigation in effect precluded federal court intervention</u>. Had petitioner sought federal habeas relief while the state court litigation was continuing, considerations of comity and federalism would almost certainly have required dismissal. Both doctrines compel a respect for state functions and counsel against interference with ongoing state judicial proceedings. *Judice v. Vail* (1977) 430 U.S. 327, 335, 97 S.Ct. 1211, 1217, 51 L.Ed.2d 376; *Huffman v. Pursue, Ltd.* (1974) 420 US. 592, 601, 95 S.Ct. 1200, 1206, 43 L.Ed.2d 482; *Younger v. Harris* (1971) 401

> U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669. Moreover, the California Supreme Court's determination on the guilt phase is unlikely to have induced a district court to hear petitioner's habeas since in this circuit, finality of one issue in the state courts is not generally sufficient to circumvent the requirements of comity and federalism. *Drury v. Cox* (9th Cir. 1972) 457 F.2d 764, 765. Thus, it appears that at the earliest petitioner could not have filed in federal court until 1967 following the California Supreme Court's affirmance of the death penalty imposed at the second penalty trial, and perhaps not even until 1974 when the state litigation was finally resolved.

Hillery v. Sumner, 496 F.Supp. 632, 637 (E.D. Cal. 1980). Emphasis added.

Having taken the position that review should have been sought earlier and having lost their argument in *Hillery v. Sumner*, it seems unfair that one should again lose when taking the opposite position, as was done in the instant case. "But justice, though due to the accused, is due the accuser also." *Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S.Ct. 330, 78 L.Ed. 674 (1934).

II.

THE THREE JUDGE PANEL IMPROPERLY REVERSED THE DISTRICT COURT'S DISMISSAL OF RESPONDENT'S HABEAS CORPUS PETITION ON GROUNDS OF ABSTENTION UNDER COMITY AND FAILURE TO EXHAUST BECAUSE OF RESPONDENT'S PENDING PENALTY APPEAL IN THE STATE COURTS WHEN IT FOUND THE GUILT PHASE HAD BEEN EXHAUSTED IN THE STATE COURTS AND THAT A DELAY OF FIFTEEN YEARS, WITHOUT MORE, JUSTIFIED FEDERAL INTERVENTION

The finding by the Ninth Circuit that the guilt phase was final in the state courts is wrong. As noted by the Ninth Circuit panel (Appendix A at 5804, fn. 1), while it is true that respondent's guilt conviction was affirmed on his original automatic appeal (*People v. Phillips*, *supra*, 41 Cal.3d at 84) and that the California Supreme Court does treat that as a final judgment for direct appeal purposes (*People v. Kemp*, 10 Cal.3d 611, 614; 517 P.2d 826; 111 Cal.Rptr. 562 (1974); *People v. Jackson*, 67 Cal.2d 96, 98; 429 P.2d 600; 60 Cal.Rptr. 248 (1967)), the court in *Kemp* also recognized that at the appeal from a penalty retrial, the defendant could challenge the guilt phase "under any applicable retroactive constitutional decision of the United States Supreme Court or of this court filed after affirmance of this judgment on the issue of guilt." *People v. Kemp*, *supra*, 10 Cal.3d at 613. Thus "final" does not mean the guilt phase is totally immune from further direct appellate attack, nor is it immune from collateral attack in the California Supreme Court. In the instant case, respondent's advisory counsel was appointed to represent respondent on the automatic appeal of his penalty retrial

in the California Supreme Court and was informed he could also challenge the guilt phase on state habeas corpus, but this was limited to guilt phase issues that had not been raised in prior pleadings. Appendix Q at 2-3. Thus, the California Supreme Court recognized that respondent, if he chooses, can still collaterally attack the guilt conviction in that court. While respondent may now allege that at present he has no intent to attack the guilt phase in the California Supreme Court, it is a good bet that he would not now chisel this waiver in granite to forever preclude him from either a collateral attack on habeas corpus or a direct attack within the pending appeal based on retroactivity which fortuitously presented itself in futuro. Thus, the Ninth Circuit erred in finding that under California law the guilt phase is final.

The Ninth Circuit's finding of substantial delay is also wrong, but has even more drastic consequences for the federal court workload. In discussing substantial delay, the court cited to *Coe v. Thurman*, 922 F.2d 582 (9th Cir. 1991). Appendix A at 5811, 5817. Therein, in discussing state appellate delay as a section 2254(b) exception to the requirement that an applicant exhaust his available state remedies, the *Coe* court quoted from *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972): "'We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.' *Id.* at 521, 92 S.Ct. at 2187," and noted the applicability of the four factors delineated in *Barker* regarding speedy trial. The four are: (1) length of delay; (2) reason for delay; (3) defendant's assertion of his right; and (4) prejudice to the defendant. In addition, the three sub-factors *Barker* utilized to determine prejudice were altered for determining prejudice in appellate delay to: "(1) oppressive incarceration pending appeal; (2) anxiety and concern of the convicted party awaiting the outcome of the appeal;

and (3) impairment of the convicted person's grounds for appeal or of the viability of his defense in case of retrial." *Coe v. Thurman, supra*, 922 F.2d at 531-532.

In reaching its ruling in the instant case, the Ninth Circuit panel looked to only length of delay and presumed that respondent had been prejudiced in preparing for a possible guilt phase retrial. In doing so the Ninth Circuit ignored the other factors under *Barker v. Wingo* and *Coe v. Thurman*, despite the following language:

> As *Barker* reminds us, we regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities: courts must still engage in a difficult and sensitive balancing process. *Id.* 407 U.S. at 533, 92 S.Ct. at 2193.

Coe v. Thurman, supra, 922 F.2d at 532.

Because of the unique procedural posture of this case (see fn. 1, *supra*) there was no real record before either the District Court or the Ninth Circuit. Nor did the Ninth Circuit ever attempt to secure a copy of the proceedings before the state courts. In fact, when given the opportunity to review these materials, the Ninth Circuit refused to consider them. Petitioner attempted to address the reasons for the delay in the petition for rehearing (Appendix V), but the panel denied petitioner's motion to lodge the relevant documents with that court (Appendix K, Y-1, Y-2, Y-3) and denied the petition for rehearing. Appendix L. Petitioner has filed a similar motion to lodge those documents with this Court. See fn. 1, *supra*.

It would seem to be a fundamental precept of justice that before a court makes a legal ruling which is dependent on a factual record, the court must be willing to assure itself that the facts upon which it is relying are accurate. This would seem to be especially true with respect to precedent setting decisions such as that involved in the instant case.

The time between respondent's arrest in Utah in March 1978 (*People v. Phillips*, *supra*, 41 Cal.3d at 42, 75) and his initial California conviction and sentence in February 1980 (Appendix V at 4, 16-17), cannot be characterized as an unjustified delay since it involved extradition in a capital case.

It would be a mischaracterization to call the time between the filing of the state appellate briefs on January and February 1981, and the California Supreme Court's opinion on December 31, 1985, as an unjustified delay. The California Supreme Court took extra pains with the capital case, even ordering supplemental briefing in areas of concern after oral argument which supplied the basis for the penalty reversal. Appendix V at 5-6, 16-17; *People v. Phillips*, *supra*, 41 Cal.3d at 65-75, 81-84.

The interval between the December 31, 1985, reversal of the penalty verdict and the penalty retrial in late 1991, (with a sentence of death being imposed on March 13, 1992) (Appendix M at 3-19; Appendix V at 6-14, 17), was the direct result of intentionally dilatory conduct by respondent. He waived retrial dates, requested postponements of his retrial date, filed numerous motions, changed counsel more than once, and filed numerous state habeas corpus petitions, all of which contributed to the time it took to complete his penalty retrial. Thus this 5-year period cannot be considered as an improper or unduly prolonged delay, since it was directly attributable to respondent's own volitional actions in delaying the retrial.

The period between respondent's March 13, 1992, penalty retrial sentencing and the present date during which his automatic appeal is pending before the California Supreme Court is based in great part on respondent's actions during the retrial. Acting as his own lawyer, respondent did something unique. He tape recorded his penalty retrial and then sought numerous extensions of time from the California Supreme Court to correct the trial transcript to conform the transcripts to the audio tapes. This process became a horrendous and complex task but a problem of respondent's own making. Once the California Attorney General's Office had been provided with a duplicate set of tapes by respondent, state personnel had go through the tedious process of checking on respondent's lengthy list of corrections to the penalty retrial transcript. Appendix V at 17-18. This delay between penalty sentencing on March 13, 1992, and the present can clearly be laid at respondent's doorstep.

It must also be pointed out that the three-year delay between the federal habeas corpus petition on March 4, 1992, and the ruling by the Ninth Circuit on May 26, 1995, reversing the District Court's dismissal of the petition is most certainly not attributable to the state.

Thus, when one looks to the actual record behind the 15-year period from when the Madera County Jury first found respondent guilty of murder, the vast majority of this time was eaten up by respondent in his attempts to avoid a penalty retrial. The initial period which was involved in his first capital appeal clearly inured to respondent's benefit, since it is conceivable that, absent the delay for the court requested supplemental briefing, respondent would not have had a penalty reversal. Thus, the reasons for the delay clearly legitimize the length of the time which the California Supreme Court spent considering this case. It is

perverse, ironic and inaccurate for the Ninth Circuit to conclude that this case involves unconscionable delay caused by state inaction.

Also, the presumption of prejudice to respondent in any retrial as found by the Ninth Circuit panel is clearly erroneous. As noted in the California Supreme Court's opinion, respondent testified at his initial trial and claimed alibi, impliedly putting the blame for the capital murder on his "friend," Richard Graybill. *People v. Phillips*, *supra*, 41 Cal.3d at 42-43. Graybill also had testified at that trial. *Id.* at 52 fn. 5. At the 1991 penalty phase retrial the People put on basically the same case as presented at the 1980 guilt trial. The People established the murder of Bruce Bartulis and the shooting, setting on fire and running over of Ronald Rose by respondent and the "hit list" respondent had mailed from the Utah jail giving specific directions how to kill (1) surviving victim Rose, (2) respondent's girlfriend, Sharon Colman, a witness to the murder, (3) Richard Graybill, the "friend" whom he blamed for the murder, and (4) respondent's own mother who could blow his alibi defense. Compare *People v. Phillips*, *supra*, 41 Cal.3d at 39-42, 62-63, 75-77, with N.L. -- Item 11 at 7-22. Graybill's testimony from the prior trial was read to the jury because Graybill had since become deceased. N.L. -- Item 11 at 7 fn. 5. Respondent, who claims he lied at his first trial (Appendix M at 3), put on a totally different penalty defense. Respondent did not testify and did not put on his alibi defense. He, instead attempted to put on a defense of a mutual shoot-out between respondent and Rose and Bartulis with Bartulis getting killed. Compare *People* v. *Phillips*, *supra*, 41 Cal.3d at 42-43 with N.L. -- Item 11 at 22-32. This apparently is the same defense he attempted to raise in the habeas corpus petition filed in the District Court that is at issue. Appendix M at 3, 12, 24, 33-37, 45. It thus would

appear that respondent has made good use of the delay between his original conviction in 1980 and his retrial in 1991 to scrupulously review the record and present an entirely different defense. There clearly was no prejudice to him by that delay between trials, and, likewise there should be no future prejudice to him if the federal court should demand a further retrial, except that he may be denied the "right" to manufacture a new defense.

Thus, the Ninth Circuit panel's ruling that the 15-year period which had elapsed since the guilt phase verdict and the presumed prejudice to respondent in dealing with any future guilt retrial is totally lacking in any foundational support, and, in fact, the real evidence, which was not even considered by the Ninth Circuit, is to the contrary,. Thus, the finding of extraordinary delay, either within the meaning of section 2254(b), rendering the state corrective process ineffective, or within the meaning of the unusual circumstances exception to abstention under *Younger v. Harris*, is flat out wrong and must be corrected by this Court's reversal of the Ninth Court opinion. The Ninth Circuit's clear error in finding that the state judicial proceedings necessary to hear and consider respondent's appeal from his penalty phase retrial amounted to unusual circumstances allowing the federal courts to review the guilt phase of respondent's capital trial must be reversed.

CONCLUSION

To permit a capital defendant to challenge the guilt phase of his trial in the federal courts while the appeal of his penalty retrial is still pending in the state courts violates all the rules of abstention under comity.

For all the reasons stated herein, Petitioners respectfully urge that this Court grant certiorari in this matter and resolve the important issues of law presented herein; or alternatively reverse and remand the judgment of the Ninth Circuit to enable the issue of delay to be first considered in the District Court with a full and complete proper record before it.

Dated: October 12, 1995.

Respectfully submitted,

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95-616

No. 95 -

Supreme Court, U.S.
FILED
OCT 16 1995
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

APPENDIX VOL. 1 TO PETITION FOR WRIT OF CERTIORARI

APPENDICES A-Q

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APPENDIX IN RICHARD LOUIS ARNOLD PHILLIPS

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PETITION FOR WRIT OF CERTIORARI

APPENDIX A

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,
Petitioner-Appellant,

v.

DANIEL B. VASQUEZ, Warden, San Quentin State Prison,
Respondent-Appellee.

No. 92-15828

D.C. No. CV-92-5167-REC

OPINION

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, District Judge, Presiding

Argued and Submitted
October 11, 1994—San Francisco, California

Filed May 26, 1995

Before: Betty B. Fletcher, Stephen Reinhardt, Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Reinhardt;
Concurrence by Judge Kleinfeld

SUMMARY

Criminal Law and Procedure/ Habeas Corpus/Capital Cases

The court of appeals reversed a district court judgment and remanded. The court held that, in light of extraordinary delay, a defendant could bring his habeas petition regarding the constitutionality of his conviction despite the fact that the state of

California had not yet made a final ruling on his death sentence.

In 1980, appellant Richard Phillips was convicted of first degree murder with special circumstance, attempted murder and robbery. He was sentenced to death. In 1985, the Supreme Court of California affirmed Phillips' conviction but reversed his death sentence. Phillips was not resentenced to death until 1992; the automatic appeal from that sentence is pending before the state supreme court.

Phillips petitioned for a writ of habeas corpus in 1992. His petition contained only claims arising from his conviction. The district court dismissed the habeas petition without prejudice on two grounds. First, it declined to interfere with the ongoing state criminal proceeding under the abstention doctrine first articulated in *Younger v. Harris*. Second, because Phillips' sentencing appeal was still pending, the court dismissed the petition on the ground that he had not exhausted available state remedies as required by *Rose v. Lundy*.

Phillips sought to appeal the decision to dismiss his petition, but the district court declined to issue a certificate of probable cause. The court of appeals granted Phillips' request for a certificate of probable cause.

[1] California has bifurcated into "separate phases" what it calls the guilt phase and the penalty phase of death penalty cases. It was undisputed that the guilt phase of this case was final. Habeas corpus proceedings regarding the guilt phase would not affect the ongoing state proceedings. [2] The Supreme Court's holding in *Younger* that federal courts must exercise significant caution in enjoining ongoing state criminal proceedings was inapplicable to this case. The abstention doctrine did not prevent review of Phillips' petition. [3] In addition, the district court erred in dismissing Phillips' habeas petition for failure to exhaust state remedies under *Rose*. [4] Phillips sought only to attack his conviction and did not (and

could not) seek federal review of claims arising from his sentence.

[5] In this case, Phillips' right to reasonably prompt constitutional scrutiny of his conviction outweighed any prudential concerns that might have existed. [6] Almost 15 years had passed since the date of Phillips' conviction. It had been ten years since the state supreme court vacated Phillips' first death sentence. More than three years passed since the second death penalty trial. [7] And, there was no end in sight. [8] The jurisprudential concerns were relatively weak when balanced against the significant harms that could have arisen from further delay. [9] The delay in this case rendered the state corrective process "ineffective" within the meaning of a relevant habeas statute. [10] Fifteen years, with no end in sight, was simply too long a period to require a prisoner to await review of what might be an unconstitutional conviction, merely because an entirely separate and independent review of his sentence had not been resolved in a timely fashion. [11] Thus, Phillips' habeas petition was reinstated.

Circuit Judge Kleinfeld concurred, stating that *Younger* applied, but contained an equitable exception for cases like this one. Circuit Judge Kleinfeld also expressed the belief that the court of appeals did not have the power to hold that, if Phillips filed a subsequent petition attacking his sentence, he would have demonstrated "good cause" for filing more than one petition.

COUNSEL

Donald Horvath, Fresno, California, for the petitioner-appellant.

Edmund D. McMurray, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

REINHARDT, Circuit Judge:

It has been almost fifteen years since Richard Louis Arnold Phillips was convicted of murder and first sentenced to death, and ten years since the state supreme court affirmed his conviction and vacated his sentence. The question before us is whether we should now review the constitutionality of Phillips' conviction or require him to continue to wait until the state has rendered a final decision regarding his sentence before allowing him to petition for habeas review of the conviction.

BACKGROUND

In 1980, Phillips was convicted of first degree murder with special circumstance, attempted murder, and robbery; he was subsequently sentenced to death. The State of California has bifurcated the process for adjudicating guilt and imposing a death sentence; thus, the death sentence is imposed through an entirely separate trial. In 1985, the Supreme Court of California affirmed Phillips' conviction but reversed his death sentence. *People v. Phillips*, 711 P.2d 423 (Cal. 1985). Phillips was not resentenced to death until 1992; the automatic appeal from that sentence has been pending before the state supreme court since early 1993. Thus, Phillips' conviction has been final for approximately ten years while the validity of his death sentence remains unresolved.

Despite the significant delay that has already taken place, there is no indication that Phillips' appeal from his sentence will be decided anytime in the near future. To the contrary, due to significant problems involving inaccuracies in the sentencing trial transcript, it appears that the state supreme court may not decide the case for some time. Thus, there is no way to determine when Phillips' sentence will be final, even assuming that the state supreme court will affirm it. Of

course, if that court again finds errors in the sentencing decision, Phillips may well be forced to wait another substantial period of time before any sentence becomes final under state law.

Phillips petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in 1992; his petition contained only claims arising from his conviction. The district court dismissed the habeas petition without prejudice on two grounds. First, it declined to interfere with the ongoing state criminal proceeding under the abstention doctrine first articulated in *Younger v. Harris*, 401 U.S. 37 (1971). Second, because Phillips' sentencing appeal was still pending, it dismissed the petition on the ground that he had not exhausted available state remedies as required by *Rose v. Lundy*, 455 U.S. 509 (1982). The district court subsequently declined to issue a certificate of probable cause when Phillips sought to appeal its decision to dismiss his petition.

We granted Phillips' request for a certificate of probable cause and instructed the parties to submit briefs regarding the exhaustion and abstention issues. Accordingly, we may exercise jurisdiction over the district court's denial of Phillips' habeas claim under 28 U.S.C. § 2253.

In light of the extraordinary delay, we hold that Phillips may bring his habeas petition regarding the constitutionality of his conviction despite the fact that the state has not yet made a final ruling on his sentence. We conclude that Phillips' right to reasonably prompt review of his conviction outweighs the jurisprudential concerns that might otherwise lead us to decline to review his petition. Neither *Rose* nor *Younger* prevents him from seeking and obtaining habeas review of his conviction.

ANALYSIS

A. *Finality of the Judgment*

The state does not contest Phillips' argument that his state conviction is final. It argues that he is not yet subject to a final judgment, because his sentence is not yet final.

[1] California procedure separates the determination of guilt from the determination of penalty especially sharply. California has bifurcated into "separate phases" what it calls the guilt phase and the penalty phase of death penalty cases. See Cal. Penal Code § 190.1. It is undisputed that the guilt phase of this case is final.[1] It has been affirmed by the California Supreme Court. No further review of the guilt phase in state court is available. Habeas corpus proceedings regarding the guilt phase will not affect the ongoing state proceedings.

B. *The Requirements of* Younger *and* Rose

Although the state makes no argument regarding the finality of the judgment under California law, it asserts that federal law — specifically the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), and the exhaustion requirement of

[1]Indeed, the state courts have consistently held that a conviction under California's bifurcated process for adjudicating death penalty cases is a final judgment. For example, in *People v. Jackson*, 429 P.2d 600, 602 (Cal. 1967) (discussing the retroactive application of *Escobedo v. Illinois*, 378 U.S. 478 (1965)), the Supreme Court of California noted that "[a] judgment becomes final when all avenues of direct review are exhausted" and specifically held that a conviction for murder is a final judgment even when the death penalty sentence has been reversed and is not yet final. Similarly, the Supreme Court of California noted that when a judgment is vacated only insofar as it relates to the death penalty, "[t]he scope of th[e] retrial is a matter of state procedure under which the original judgment on the issue of guilt remains final during retrial of the penalty issue and during all appellate proceedings reviewing the trial court's decision on that issue." *People v. Kemp*, 517 P.2d 826, 828 (Cal. 1974) (discussing the application of *Escobedo*).

Rose v. Lundy, 455 U.S. 509 (1982) — precludes this court from considering Phillips' habeas petition until the state courts have reached a final determination concerning his sentence. We disagree.

[2] First, on appeal Phillips does not seek to enjoin an ongoing state proceeding; instead, he seeks only to collaterally attack his conviction. The state has already adjudicated Phillips' guilt, its decision in that regard is final, and Phillips seeks nothing more than federal review of that decision. The ongoing state proceeding involves sentencing only, and the state is free to continue with its sentencing determination. The rule against staying a proceeding does not prevent us from deciding a related issue, even if that decision ultimately renders the state proceeding moot. Thus, the Supreme Court's holding in *Younger* that federal courts must exercise significant caution in enjoining ongoing state criminal proceedings is inapplicable to the case before us. Accordingly, we hold that the abstention doctrine does not prevent us from reviewing Phillips' petition.[2]

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[2]In his separate concurrence, Judge Kleinfeld asserts that *Younger* should generally apply but concludes that an exception to *Younger* justifies our decision in this case. However, the only cases he cites concern the application of *Younger* to ongoing trials or direct appeals. *See, e.g., Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975) (concluding that *Younger* applies to state appellate proceedings as well as to ongoing proceedings in a state trial court); *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983) (declining to provide a petitioner appellate counsel and trial transcripts for an ongoing state appeal from a state criminal trial); *Drury v. Cox*, 457 F.2d 764, 764-65 (9th Cir. 1972) (declining to entertain a petition claiming that the state lacked probable cause to bind a defendant over for trial when the defendant had not yet been convicted in state court). Here, in contrast, the state proceeding regarding Phillips' conviction is final and, according to Phillips, fully exhausted both with regard to direct and collateral state remedies; our decision, if favorable to Phillips, would simply overturn the result in a completed state proceeding just like decisions ordinarily do in the case of successful habeas petitions. The only difference, here, is that a decision on the merits of Phillips' habeas petition might effectively moot the state's entirely separate and independent adjudication of his sentence.

[3] Second, we conclude that the district court erred in dismissing Phillips' habeas petition for failure to exhaust state remedies under *Rose*. In *Rose*, the Supreme Court held that a petition containing both exhausted and unexhausted claims must be dismissed. The plurality opinion noted, however, that prisoners who submit mixed petitions "nevertheless are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of the claims." *Rose*, 455 U.S. at 520.[3]

Our concurring colleague's argument would be more persuasive if, as he suggests, " 'final judgment' " always " 'means sentence.' " Concurrence, at 5815 (quoting *Berman v. United States*, 302 U.S. 211, 212 (1937)). However, his reliance upon *Berman* is misplaced. First, as we discuss above, California law makes clear that a conviction is final even if the sentence is not. *See supra* note 1. More important, the Supreme Court has explicitly rejected the notion that final judgment always means sentence when, as here, the conviction and sentencing procedures are bifurcated. Indeed, it specifically held in *Brady v. State of Maryland*, 373 U.S. 83 (1963), that "the general rule that 'Final judgment in a criminal case means sentence. . . .' cannot be applied" to cases in which separate trials are conducted in determining a defendant's guilt and imposing his sentence. *Brady*, 373 U.S. at 85 n.1 (citations omitted). As the Court noted, the ground for its holding that the rule is inapplicable to such cases is that the defendant's guilt "is 'independent and unaffected by' what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence." *Id.* (citations omitted). Thus, *Younger* does not apply to this case.

[3]The Court added that "[b]y invoking this procedure . . . the prisoner would risk forfeiting consideration of his unexhausted claims in federal court" if a district court found that a second petition containing claims that were unexhausted in the first petition represented an abuse of the writ. *Rose*, 455 U.S. at 520-21. Indeed, the Court's recent decision in *McClesky v. Zant*, 111 S. Ct. 1454 (1991), suggests that most petitioners seeking to review their convictions without exhausting their claims regarding their sentences risk losing the opportunity to seek habeas review of their sentences at a later date. Phillips, of course, may not have to bring a second habeas petition because our ultimate decision renders the sentencing issues moot, because the state's sentencing decision is free from constitutional error, or because a life sentence is ultimately imposed. (Under state law, a person convicted of first degree murder with special circumstances can

[4] The plurality thus makes clear that a defendant may choose to submit a petition containing only exhausted claims, even when his remaining claims are unexhausted, without violating the principle articulated in *Rose*. Indeed, a number of appellate courts, including this one, have held that *Rose* does not require dismissal when the petition before the court contains only exhausted claims. *See, e.g., Powell v. Spalding*, 679 F.2d 163, 166 (9th Cir. 1982) (holding that courts may properly review a habeas "petition containing only exhausted issues"); *see also Peoples v. Fulcomer*, 882 F.2d 828, 832 (3d Cir. 1989); *Williams v. Maggio*, 727 F.2d 1387, 1389 (5th Cir.

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receive only a sentence of death or life imprisonment. *See* Cal. Penal Code § 190.3 (West 1988)).

However, even if Phillips were to bring a second habeas petition limited to challenging his sentence, under the extraordinary circumstances of this case, *see infra* pp. 5807-13, doing so would not represent an abuse of the writ. *See Burris v. Farley*, 1995 U.S. App. LEXIS 6225, at *3 (7th Cir. Mar. 28, 1995) (suggesting that a defendant in Phillips' situation would have a "persuasive answer" to an accusation that he had abused the writ). We note first that, although neither we nor the Supreme Court has considered whether two separate habeas proceedings may be instituted when a state has adopted a bifurcated process that results in two separate trials regarding the defendant's guilt and punishment, we doubt that the Supreme Court would ordinarily permit separate habeas proceedings in such cases. Accordingly, we do not base our determination as to a separate petition regarding Phillips' sentence on the fact that California's capital cases are bifurcated. Rather, we conclude that a person who has already waited fifteen years for a final decision in order to challenge the constitutionality of that conviction cannot be compelled to choose between bringing a petition regarding that conviction and forfeiting his right to challenge the sentence, on the one hand, and waiting until the sentence is final to file a habeas petition, on the other. Although our conclusion might under other circumstances constitute dictum, we make it a part of our opinion because we believe that Phillips is entitled to a resolution of this question before determining finally whether to attack his conviction separately. As the Seventh Circuit has recently noted, it would be patently unfair to contend that "a prisoner whose principal hope lies in setting aside his conviction must stake his life on prevailing (because, if he loses, he forfeits any entitlement to contest the penalty later)." *Burris*, 1995 U.S. App. LEXIS 6225, at *4.

1984); *Taylor v. Curry*, 708 F.2d 886, 889 (2d Cir. 1983), *cert. denied*, 464 U.S. 100 (1984). Thus, because Phillips sought only to attack his conviction and did not (and could not) seek federal review of claims arising from his sentence, the district court erred in dismissing the petition for failure to exhaust state remedies regarding his sentence.[4]

C. *Jurisprudential Concerns*

[5] We recognize, of course, that a decision to allow Phillips to pursue his habeas petition before the state renders a final decision regarding his sentence implicates many of the prudential concerns outlined in *Rose*, particularly those concerning the dangers of piecemeal litigation. However, we believe that in this case Phillips' right to reasonably prompt constitutional scrutiny of his conviction outweighs any prudential concerns that might exist.

We have consistently recognized that unusual delay in the state courts may justify a decision to protect a prisoner's right to a fair and prompt resolution of his constitutional claims despite the jurisprudential concerns that have led us to decline to review a claim or to require full exhaustion in other cases in which a proceeding related to the federal petition is pending in state court. For example, in *Coe v. Thurman*, 922 F.2d 528 (9th Cir. 1991), we held that a prisoner who brings a due process claim arising from delay in the state appellate process is not required to exhaust state remedies in order to obtain federal review of his claim. Indeed, we noted that extraordi-

[4]Phillips alleges that he fully exhausted all available state collateral remedies regarding his conviction before filing his habeas petition. However, it appears that Phillips did not properly serve the state in filing this petition, potentially depriving it of an opportunity to contest whether he fully exhausted state remedies for the claims within his petition. If on remand the district court finds that the state was not given an adequate opportunity to raise this issue, the state may contest whether Phillips exhausted these claims and, if not, whether his failure was an excusable one.

nary delay in the state courts can render state corrective processes "ineffective" within the meaning of section 2254(b) and that exhaustion is not required in such cases. *Coe*, 922 F.2d at 530. Similarly, in *Okot v. Callahan*, 788 F.2d 631, 633 (9th Cir. 1986), we noted that when a prisoner "receives ineffective relief in state court because of unreasonable delay, he may file a habeas proceeding in federal court. In such cases, federal habeas relief may well be available despite failure to exhaust state remedies." *Okot*, 768 F.2d at 633; *see also Story v. Kindt*, 26 F.3d 402, 405 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 593 (1994); *Burkett v. Cunningham*, 826 F.2d 1208, 1218 (3d Cir. 1987).

1. *The Significance of Extraordinary Delay in the State Courts*

[6] In the case before us, almost fifteen years have passed since the date of Phillips' conviction. It has been a decade and a half since Phillips was first sentenced to death and ten years since the state supreme court vacated that sentence. More than three years have passed since the second death penalty trial took place.

[7] In addition, as the state concedes, there is no end in sight. It has already taken a significant amount of time for some of the inaccuracies in the trial transcripts to be corrected, and counsel indicated to us at oral argument that further revisions will be necessary. Moreover, it is quite possible that the state supreme court will again find errors in the sentencing decision and that any state determination as to Phillips' sentence may not become final for an additional number of years. Therefore, if we refuse to consider Phillips' habeas petition now, he might be forced to wait a further indeterminate period of time before he could raise any federal challenge to the constitutionality of his conviction.

The prejudice inherent in such a delay is quite evident. For fifteen years, Phillips has been compelled to remain in prison

under a possible sentence of death while being denied the opportunity to establish the unconstitutionality of his conviction. In addition, during so long a delay, there is a substantial likelihood that witnesses will die or disappear, memories will fade, and evidence will become unavailable. In short, the opportunity for a fair retrial diminishes as each day passes.

2. *Balancing Jurisprudential Concerns and Phillips' Constitutional Right*

[8] Balanced against the significant harms that may arise from further delay are relatively weak jurisprudential concerns. Comity concerns in this case are practically nonexistent since the state has had a full and fair opportunity to review the validity of Phillips' conviction and its decision regarding that conviction is final. *Cf. Hendricks v. Zenon*, 993 F.2d 664, 672 (9th Cir. 1993). Moreover, ordinary concerns for judicial efficiency are not present here; there is little risk of duplicative review since, unlike other types of criminal proceedings, any claims that Phillips might bring regarding his sentence will involve a review of an entirely separate trial and appeal under California's bifurcated system. Finally, while there is some danger that our holding might increase the risk of piecemeal litigation, even that concern is lessened by the fact that we do not know whether a death sentence will ultimately be affirmed by the state supreme court and thus whether there will ever be any ground on which a separate petition could be filed. *See supra* pp. 5805-06 n.2.

3. *The State's Argument Regarding the* Sherwood *Decision*

According to the state, Phillips must remain incarcerated for an indefinite period of years (quite possibly 20 or more) before he can seek federal review of his conviction. Indeed, the state maintains that such a rule is mandated by this court's decision in *Sherwood v. Tomkins*, 716 F.2d 632 (9th Cir. 1983), in which we held:

> When, as in the present case, an appeal of a state criminal conviction is pending, a would-be habeas corpus petitioner must await the outcome of his appeal before his state remedies are exhausted, even where the issue to be challenged in the writ of habeas corpus has been finally settled in the state courts.

Sherwood, 716 F.2d at 634.

[9] We find the state's argument to be unconvincing. First and most important, we have explicitly rejected the precise argument made by the state regarding the scope of the *Sherwood* holding in *Coe v. Thurman*, 922 F.2d 528 (9th Cir. 1991). In *Coe*, we held that extending the rule articulated in *Sherwood* to cases in which a substantial delay occurred during the state appellate process would directly contravene the language of section 2254, which eliminates the exhaustion requirement in cases in which there exist "circumstances rendering such process ineffective to protect the rights of the prisoner." *Coe*, 922 F.2d at 530 (quoting 28 U.S.C. § 2254). For this reason, we rejected the expansive interpretation of *Sherwood* that the state now urges us to adopt, holding that extraordinary delay in the state appellate process may excuse a failure to exhaust state remedies. As in *Coe*, we conclude that the delay in this case has rendered the state corrective process "ineffective" within the meaning of 28 U.S.C. § 2254(b).

Second, *Sherwood* is easily distinguishable. Our decision in that case rested upon the fact that the pending state appeal might result in the reversal of the petitioner's conviction and eliminate the federal question, *Sherwood*, 716 F.3d at 634, thereby rendering any decision by us moot and wasting precious judicial resources. In this case, there is no danger that the pending state appeal will moot our decision since it concerns the sentence, not the conviction underlying it.

The distinction we draw above is supported by our decision in *Blazak v. Ricketts*, 971 F.2d 1408 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 1866 (1994). In determining whether a district court's holding was a final, reviewable decision, we concluded that a habeas petition concerning a sentence where the issues surrounding the conviction are unresolved is distinguishable from a habeas petition concerning a conviction where the sentencing issues are unresolved. In agreeing to consider a habeas petition challenging a conviction even though the sentencing issues remained unresolved — and thus declining to follow the rule articulated by the Eleventh Circuit in *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992) (en banc), regarding habeas appeals with unresolved claims — we noted:

> In *Clisby* [where the court declined to consider a habeas petition], the district court granted relief as to the imposition of a sentence of death, but reserved judgment on claims going to the underlying conviction. As a result, the conviction issues remained alive and unresolved regardless of whether the court of appeals affirmed or reversed the district court's decision on the penalty issues. . . . Unlike *Clisby*, however, in the present appeal we have a complete resolution of all of the alleged constitutional infirmities arising from the relevant set of operative facts relative to conviction. This decision renders the sentencing issues moot. . . . Thus, unlike *Clisby*, if we affirm, the habeas corpus action is completed.

Blazak, 971 F.2d at 1413 (citations omitted).

Moreover, a decision to extend *Sherwood* to an unusual case like this one might raise concerns somewhat analogous to those outlined by the Supreme Court in *Corey v. United States*, 375 U.S. 169 (1963). In reviewing a statute that enabled a court to hold a defendant in prison while it obtained more detailed information to determine the appropriate sentence, the Court held that the prisoner could appeal his con-

viction immediately or wait until the final sentence was imposed before appealing. It noted that a rule requiring the defendant to wait until the final sentence was imposed before appealing "would . . . forestall any opportunity of a prompt appeal from an underlying criminal conviction . . . [and] the imposition of such a mandatory three- or six-month term of imprisonment before the defendant could file an appeal might raise constitutional problems of significant proportions." *Corey*, 375 U.S. at 173.[8]

4. *The Seventh Circuit's Decision*

Finally, we note that our holding in this case is hardly a novel one. Indeed, the Seventh Circuit has recently reached precisely the same result in an almost identical case. In *Burris v. Farley*, 1995 U.S. App. LEXIS 6225 (7th Cir. Mar. 29, 1995), the Seventh Circuit entertained a habeas petition by a defendant who had fully exhausted state remedies with regard to his conviction but whose sentence was not final at the time he filed the petition. In concluding that the petitioner's failure to exhaust state remedies with regard to his sentence did not preclude it from reaching the merits of his collateral attack upon his conviction, the court held:

> When a state handles his case in a glacial fashion, a prisoner need not wait for global warming to set in. The extended proceeding needed to fix the penalty for murder need not imply that a person with a colorable claim of innocence must cool his heels in prison for a decade or more before being entitled to present to a federal court his challenge to the judgment of conviction.

Burris, 1995 U.S. App. LEXIS 6225, at *4. Although we prepared our opinion prior to receipt of the Seventh Circuit's, we

[8]We also note that *Sherwood* did not involve a death penalty case or the bifurcated process that is applicable in such cases. *See supra* note 2.

could not have summarized our conclusion here in a more concise, or more colorful, fashion than did our fellow circuit.

CONCLUSION

[10] Our decision in this case is a narrow one. We simply hold that Phillips should not be required to wait more than fifteen years for his sentence to be finally resolved before he may challenge the constitutionality of his conviction. We are fully aware of the jurisprudential concerns implicated by our decision, but conclude that they are outweighed by Phillips' interest in a prompt resolution of his constitutional claims. We do not intimate any view as to what other circumstances, if any, might entitle a defendant to seek review of his conviction prior to his sentence becoming final. We are convinced, however, that fifteen years, with no end in sight, is simply too long a period to require a prisoner to await review of what might be an unconstitutional conviction, merely because an entirely separate and independent review of his sentence has not been resolved in a timely fashion. As we noted in *Blazak*:

> [U]nlike habeas grants exclusively on sentencing issues, the grant of a habeas petition because of the constitutional invalidity of a conviction raises concerns that a possible innocent person has been unjustifiably incarcerated on death row for a number of years. *Delaying retrial in such cases, while attorneys fight over a sentence that may no longer exist, risks the perpetuation of a monumental injustice should retrial ultimately result in an acquittal.*

Blazak, 971 F.2d at 1414 n.7 (emphasis added).

[11] For the above reasons, we reinstate the petition. The district court's decision is

REVERSED AND REMANDED.

KLEINFELD, Circuit Judge, concurring:

I concur. My analysis differs in two respects, on abstention and on our purporting to make a holding in a case not before us.

The majority concludes that *Younger v. Harris*, 401 U.S. 37 (1971), "is inapplicable," and analyzes the case in terms of "prudential concerns." In my view, *Younger* applies, but contains an equitable exception for cases like this one.

The majority analyzes much of the case in terms of *Rose v. Lundy*, 455 U.S. 509 (1982). This case is not a *Rose* problem. *Rose* holds that federal courts should dismiss mixed petitions. This is not a mixed petition. The state does not argue that Phillips has included any claims not exhausted in state court in his petition.

In *Younger*, the Supreme Court held that federal courts generally may not enjoin ongoing state criminal proceedings, but leaves room for possible exceptions to the general rule for "bad faith, harassment, or other unusual circumstance that would call for equitable relief." *Id.* at 54. *Younger* abstention applies to collateral attacks on convictions as well as petitions for injunctions. *See Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 489 (1973). The doctrine generally bars habeas corpus petitions in federal court even where the conviction has been affirmed through all available levels of direct review in the state courts, so long as finality has not yet been achieved regarding the sentence. *Cf. Berman v. U.S.*, 302 U.S. 211, 212 (1937)("Final judgment in a criminal case means sentence. The sentence is the judgment."); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975) ("Virtually all of the evils at which *Younger* is directed would inhere in federal intervention prior to the completion of state appellate proceedings, just as surely as they would if such intervention occurred at or before trial."); 28 U.S.C. § 2254 ("in custody pursuant to a judgment of the State court").

We have held that "[w]hen, as in the present case, an appeal of a state criminal conviction is pending, a would-be habeas corpus petitioner must await the outcome of his appeal before his state remedies are exhausted, even where the issue to be challenged in the writ of habeas corpus has been finally settled in the state courts." *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983). *See also Drury v. Cox*, 457 F.2d 764, 764-65 (9th Cir. 1972)("Our reading of *Younger v. Harris* convinces us that only in the most unusual circumstances is a defendant entitled to have federal interposition by way of injunction or habeas corpus until after the jury comes in, judgment has been appealed from and the case concluded in state courts. Apparent finality of one issue is not enough." (citation omitted)); *Hillery v. Pulley*, 733 F.2d 644 (9th Cir. 1984) (affirming *Hillery v. Sumner*, 496 F. Supp. 632, 637 (E.D. Cal. 1980)).

Younger abstention is an equitable doctrine, and leaves room for an exception for "unusual circumstance that would call for equitable relief." *Younger*, 401 U.S. at 54. In the case at bar, Phillips' confinement apparently began in 1978 when he was arrested, yet by 1992, fourteen years later, when he filed his petition for habeas corpus, the state had not yet issued a final judgment in his case. This delay, combined with California's bifurcation of the guilt phase and the penalty phase of the proceeding, and the finality of the state adjudication of guilt which is the only subject of the petition, allow for application of "unusual circumstances" exception in *Younger*. The "policy against federal interference with state criminal prosecutions," *Younger*, 401 U.S. at 46, is not implicated, because federal habeas corpus review of the guilt phase will not interfere at all with anything remaining for adjudication in the state courts.

So long a delay between the beginning of confinement and finality is, in *Younger* terminology, "unusual." I agree with the majority that the unusual circumstances in this case allow for the equitable relief of permitting Phillips to petition for a

writ of habeas corpus now, instead of waiting for the state to achieve finality on his sentence. Likewise, the habeas statute includes an exception at 28 U.S.C. § 2254(b) for "absence of available State corrective process or the existence of circumstances rendering such process ineffective." The circumstances allow application of this exception. *See Coe v. Thurman*, 922 F.2d 518 (9th Cir. 1990).

I do not think we have the power to hold, as the majority opinion purports to do at footnote 2, that if Phillips files a subsequent petition attacking his sentence, he will have demonstrated "good cause" for filing more than one petition. *See McCleskey v. Zant*, 499 U.S. 467 (1991). My disagreement on this point has to do with what the terms "holding" and "dictum" mean, not with whether Phillips will have had "good cause." I am inclined to agree with the majority that if Phillips subsequently files a petition challenging his sentence, when it becomes final, he will have "good cause" for not having joined that claim with his attack on his conviction. My objection to calling this appraisal, upon which all three of us agree, a holding, is that it disposes of no issue before us, so is dictum no matter what we call it. A court can only decide the case before it. Claiming that a proposition is holding does not make it so.

An abuse of the writ case does not arise until the subsequent petition is filed. *See e.g., Burris v. Farley*, 1995 U.S. App. Lexis 6225 at *7 (7th Cir. March 28, 1995) (petitioner "must meet that defense if and when the state interposes it."). An appellate court cannot command itself to render particular decisions in subsequent cases. Stare decisis requires that like cases be decided alike. It does not enable a court to exercise power over its own judges in future cases by talking about something not dispositive of the case before it. We lack authority to decide the abuse of the writ case which may arise in the future, even though we all agree on how it should probably be decided.

I am puzzled about why the sides are reversed in this case. Usually the man sentenced to death prefers delay, the state, expedition. In this case, the man sentenced to death seeks to accelerate the final disposition in federal court of his petition for a writ of habeas corpus. I am unable to see the harm to the interests of the State of California in granting him this relief.

The writ of habeas corpus is the great writ for testing the constitutionality of confinement. The writ is severely impaired, if confinement may last fourteen years, yet not be ripe for a habeas petition. I agree that this petition should now be entertained.

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No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX B

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RICHARD LOUIS ARNOLD PHILLIPS, Petitioner, vs. M.A. HAHN, DIRECTOR, MADERA COUNTY DEPT. OF CORRECTIONS, Respondent.	No. CV-F-92-5167 REC DEATH PENALTY CASE ORDER

In 1980, the petitioner was convicted of two counts of robbery, one count of attempted murder, and one count of murder with the special circumstance of murder in the commission of a robbery. On February 20, 1980, the court sentenced the petitioner to death. People v. Phillips, 41 Cal.3d. 29, 38-39 (1985). On automatic appeal, the California Supreme Court affirmed the judgment on the guilt phase and finding of special circumstances, but reversed the judgment on the penalty phase and remanded the case for a new penalty

trial. Id. at 84.

The petitioner's penalty retrial commenced on September 23, 1991. On November 6, 1991, the jury returned a verdict of death. The petitioner's formal sentencing is scheduled for March 13, 1992, in the Madera County Superior Court. Hence, the petitioner's state court proceedings are ongoing.

On March 4, 1992, the petitioner, proceeding pro se, filed a petition with this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, an application to proceed in forma pauperis, and an application for a stay of any further proceedings in the Madera County Superior Court. A state prisoner's sole remedy to challenge the constitutionality of his confinement is habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 499-500 (1973); Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 681 (9th Cir. 1984). Here, however, the petitioner, in his application for a stay of the state court proceedings, challenges the conditions of his

confinement on death row. Such an application id not properly before this court. Recourse for the type of injury of which the petitioner complains can be obtained by filing an appropriate action in the proper federal district court.

This court declines to interfere with the ongoing state criminal proceedings on abstention grounds. See Younger v. Harris, 401 U.S. 37 (1971); see also Huffman v. Pursue, Ltd., 420 U.S. 592, 609 (1975) (the rationale of Younger applies throughout appellate proceedings). Where a district court finds Younger abstention appropriate as to a request for declaratory or injunctive relief, the court may not retain jurisdiction, but should dismiss the action. Juidice v. Vail, 430 U.S. 327, 348 (1977) (Stewart, J., dissenting).

Furthermore, a prisoner in state custody is required to exhaust state judicial remedies by affording the highest state court a fair opportunity to rule on the merits of the claims prior to bringing those claims to the federal courts. 28 U.S.C. § 2254 (b)-(c); Rose v. Lundy, 455 U.S. 509 (1982).

In the present case, although the petitioner alleges his guilt phase claims have been exhausted, his death sentence has not yet been imposed or reviewed by the state courts.

ACCORDINGLY IT IS ORDERED that the petition for writ of habeas corpus is DISMISSED WITHOUT PREJUDICE. IT IS FURTHER ORDERED that the petitioner's application for a stay of the Madera County Superior Court proceedings is DENIED. The court declines to rule on the petitioner's application to proceed in forma pauperis.

DATED: March 12, 1991

s/ Robert E. Coyle
Robert E. Coyle
UNITED STATES DISTRICT JUDGE

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
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ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX C

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RICHARD LOUIS ARNOLD PHILLIPS,	)	No. CV-F-92-5167-REC-P
Petitioner,	)	
vs.	)	DEATH PENALTY CASE
DANIEL VASQUEZ, Warden, San Quentin State Prison,	)	ORDER
Respondent.	)	

Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of this court's denial, without prejudice, of his application for writ of habeas corpus. Before the petitioner can appeal this decision, this court must issue a certificate of probable cause. Although the petitioner has failed to accompany his notice of appeal with an application for a certificate of probable cause, pursuant to Federal Rule of Appellate Procedure 229(b), this court will consider whether to issue a

certificate.

A certificate of probable cause should be granted only if the petitioner seeks to present a "substantial question" on appeal. See Gardner v. Pogue, 558 F.2d 548, 551 (9th Cir. 1977). An examination of the record reveals that the petitioner has failed to raise a "substantial question" on appeal.

For the aforementioned reason and those set forth in the order dismissing the petition for writ of habeas corpus without prejudice, IT IS ORDERED that certification of the appeal is DENIED.

DATE: 5-14-92

s/ Robert E. Coyle
Robert E. Coyle
UNITED STATES DISTRICT JUDGE

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF REVERSAL BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (BETTY B. FLETCHER, STEPHEN REINHARDT, AND ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX D

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS	)	No. 92-15828
Petitioner,	)	DC No. CVF92-5167-REC-P
v.	)	ORDER
DANIEL B. VASQUEZ, Warden, San Quentin State Prison,	)	
Respondent.	)	

Before: FLETCHER, Circuit Judge.

The request for a certificate of probable cause is granted.

(Filed June 18, 1992
Cathy A. Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX E

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,	)	NO. 92-15828
Petitioner/Appellant,	)	DC# CV-92 05167-REC
vs.	)	
DANIEL VASQUEZ, Warden,	)	ORDER
Respondent/Appellee.	)	

Before: FLETCHER, Circuit Judge

Appellant's motion to proceed on appeal in forma pauperis is granted.

The schedule for briefing this case will be as follows: The appellant's opening brief of no more than 75 pages shall be filed by October 13, 1992. The appellee's brief of no more than 75 pages shall be filed by November 30, 1992 and appellant's reply brief of no more than 35 pages shall be filed by December 21, 1992.

Upon completion of the briefing, the parties will be notified as to the scheduled date of calendaring or submission.

(Filed Aug. 26, 1992, Cathy Catterson, Clerk, U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX F

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,	)	No. 92-15828
Petitioner,	)	DC# CVF92-5167 REC-P
v.	)	ORDER
DANIEL B. VASQUEZ, Warden San Quentin State Prison,	)	
Respondent.	)	

Before: FLETCHER, REINHARDT, and KLEINFELD, Circuit Judges

Donald J. Horvath, Attorney at law, 6592 North First Street, Fresno, CA 93710 is appointed as advisory counsel for petitioner. 18 U.S.C. § 3006A. The Clerk of Court will prepare and forward to Mr. Horvath the necessary CJA 20 form.

In light of the fact that the district court declined to issue a certificate of probable cause to appeal, the court directs counsel as a preliminary matter to review court records and Mr. Phillips' files to determine, in counsel's view, whether Mr.

Phillips has exhausted his state remedies. Counsel shall file a brief with this court within sixty (60) days from the date of this order, reporting his findings and rationale as to whether this appeal should be dismissed and the case remanded to state court for exhaustion of remedies. Petitioner may have exhausted state claims in respect to his conviction, but not his sentencing. It is possible that a final judgment may be lacking and that there may be issues related to sentencing that are unexhausted. At their option, Mr. Phillips and the State of California, or either of them, may respond within twenty-one (21) days of the date of service upon them of said brief, expressing agreement or disagreement with the recommendations, giving reasons.

(FILED Oct. 1, 1992
Cathy Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF REVERSAL BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (BETTY B. FLETCHER, STEPHEN REINHARDT, AND ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX G

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,	)	No. 92-15828
Petitioner,	)	DC No. CVF92-5167-REC-P
v.	)	ORDER
DANIEL B. VASQUEZ, Warden, San Quentin State Prison,	)	
Respondent.	)	

Before: FLETCHER, Circuit Judge.

The briefing schedule contained in the August 26, 1992 order is vacated. The operative briefing schedule is contained in the October 1, 1992 order that appoints advisory counsel.

(FILED Oct. 16, 1992
Cathy Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX H

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS	)	No. 92-15828
Petitioner,	)	DC No. CVF92-5167-REC-P
v.	)	ORDER TO SHOW CAUSE
DANIEL B. VASQUEZ, Warden, San Quentin State Prison,	)	
Respondent.	)	

Before: FLETCHER, REINHARDT, and KLEINFELD, Circuit Judges.

Donald J. Horvath, advisory counsel for Richard Phillips, acting pro se, and the Attorney General of California, each is required to respond to the following:

(1) Each shall report on the status of any proceedings in respect to Richard Phillips convictions and sentence of death pending in the courts of the State of California.

(2) Why should not this appeal be dismissed without prejudice as premature in that all proceedings in the state court had

not been exhausted as of the time the petition was filed?

(3) Why should not Richard Phillips make application in the state court for any materials, computer, investigations, etc. needed in aid of his appeals and habeas corpus review until a petition for habeas corpus is properly before this court?

Responses shall be filed within thirty (30) days of the date of this order.

(FILED Dec. 2. 1993
Cathy A. Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX I

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS, Petitioner, v. DANIEL B. VASQUEZ, Warden, San Quentin State Prison, Respondent.	)	No. 92-15828 DC No. CVF92-5167-REC-P ORDER

Before: FLETCHER, Circuit Judge.

The time for oral argument in this matter is changed and the case will now be heard at **8:00 a.m. on October 11, 1994** in San Francisco, California. To insure that he is present and ready to participate in the proceedings, prison officials are to arrange to have the petitioner near the telephone where the court may reached him no later than **7:45 a.m. on Tuesday, October 11, 1994.**

(FILED Sept. 23, 1994
Cathy Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX J

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,	)	No. 92-15828
Petitioner,	)	DC No. CVF92-5167-REC-P
v.	)	ORDER
DANIEL B. VASQUEZ, Warden, San Quentin State Prison,	)	
Respondent.	)	

Before: FLETCHER, REINHARDT, KLEINFELD, Circuit Judges.

The appellant, Richard Louis Arnold Phillips, is directed to file a response to the appellee's petition for rehearing and suggestion for rehearing en banc filed with the court. The response shall be filed by advisory-counsel. In addition, Mr. Phillips may, if he so elects, file an additional response separately. Responses shall be filed within twenty-eight days from the date

of this order. No response shall exceed fifteen pages.

(FILED June 30, 1995
Cathy Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX K

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,	)	No. 92-15828
Petitioner,	)	D.C. No. CIV-F-92-5167-REC-P
v.	)	ORDER
DANIEL B. VASQUEZ, Warden, San Quentin State Prison,	)	
Respondent.	)	

Before: FLETCHER, REINHARDT, and KLEINFELD, Circuit Judges.

Respondent's Motion to Lodge Documents is DENIED.

(FILED Aug. 7, 1995
Cathy Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX L

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,	)	No. 92-15828
Petitioner-Appellant,	)	D.C. No. CIV-F-92-5167-REC-P
v.	)	ORDER
DANIEL B. VASQUEZ, Warden, San Quentin State Prison,	)	
Respondent-Appellee.	)	

Before: FLETCHER, REINHARDT, KLEINFELD, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

(FILED Sept. 14, 1995
Cathy Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX M

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Counsel for Petitioners

CAPITAL CASE
IMMEDIATE STAY REQUESTED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD LOUIS ARNOLD PHILLIPS, Petitioner, vs M.A. HAHN, DIRECTOR, MADERA COUNTY DEPT. OF CORRECTIONS, Respondent.	)	NO:

PETITION FOR WRIT OF HABEAS CORPUS

RICHARD LOUIS ARNOLD PHILLIPS
In propria persona
Donald J. Horvath, Esq. &
Barry F. Nix, Esq.
Advisory Counsel
14191 Road 28
Madera, CA 93638
(209) 673-1040

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Richard Louis Arnold Phillips, proceeding in *propria persona,* files this petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254, *et seq.,* and alleges as follows:

1. Petitioner Richard Louis Arnold Phillips (Phillips) is confined at the Madera County Jail by M.A. Hahn, Director of the Madera County Department of Corrections, pursuant to a judgment of conviction entered by the Madera County Superior Court in Action No. 4852.

2. Petitioner was convicted upon his plea of not guilty in Madera County Superior Court Action No. 4852. The case was tried to a jury starting on 22 January 1980. Phillips was found guilty of the murder of Bruce Bartulis (Bartulis) with special circumstances (murder during perpetration of a robbery), the attempted murder of Ron Rose (Rose), and robbery, all while personally using a firearm.

Petitioner presented a false alibi defense at his trial. Petitioner testified that he was not present at the crime scene where Bartulis was killed. In fact, petitioner was present at the crime scene and did shoot Bartulis.

3. On 20 February 1980, petitioner was sentenced to death.

4. Petitioner's automatic appeal of the death sentence was decided by the California Supreme Court. On 31 December 1985, the Supreme Court reversed the death penalty and affirmed petitioner's convictions upon the guilt phase and finding of special circumstances in Action No. 21372 reported at *People v. Phillips* (1986) 41 Cal.3d 29, 84, 222 Cal.Rptr. 127.

5. In addition to the automatic appeal, Phillips has previously filed other actions attacking this judgment, as described in paragraph 6.

6. Further proceedings in the California courts were as follows:

A. Petitioner filed his first habeas corpus petition in the Madera County Superior Court on or about 8 April 1988. The petition was numbered 4852, which is the number of the murder prosecution in which petitioner was convicted and sentenced to death.

This petition asserted that trial attorney Paul R. Martin[1] (Martin) was ineffective because he did not know the number of peremptory jury challenges in a capital murder case and because he did not make a motion to set aside the information pursuant to Penal Code section 995.

An evidentiary hearing was held upon the petition on 1B November 1988 before Judge Bert Bailey, assigned.

The petition was denied on 4 January 1989.

Petitioner has abandoned the points raised in this first habeas corpus petition.

---

[1] Paul Martin was Phillips' trial attorney during the guilt and penalty phase of the 1980 trial.

B. On or about 18 November 1988, Phillips filed a second habeas corpus petition in the Madera County Superior Court.[2]

In this second petition, Phillips asserted that the prosecutor failed to divulge material evidence of obvious exculpatory value to the defense, including but not limited to evidence of a shoot-out between Phillips and Rose -- i.e., Sergeant Fore's 30 December 1977 report and the 28 December 1977 transcript of a law enforcement interview with Sharon Lynn Colman (Colman), Phillips' co-defendant and the state's star witness.

In this petition, petitioner also raised the point that the Madera County District Attorney David Minier (Minier) knew or should have known that Colman was lying when she testified she did not have a deal for her testimony against

---

[2] Prior to submitting this writ of habeas corpus Phillips filed a Motion for Confidentiality with the Madera County Superior Court, which was denied through the California Supreme Court.

Phillips and failed to correct Colman's false testimony.

On 6 January 1989, Judge Bailey (assigned) issued an order to show cause upon the 18 November 1988 petition.

The prosecutor filed points and authorities in opposition to the petition supported by a declaration of prosecutor Minier Petitioner filed a traverse to the opposition.

A hearing upon the petition was held on 4 and 5 January 1990 before Judge W.J. Harpham, assigned.

On 14 February 1990, a formal order denying the petition was filed. (Exhibit 1.) The denial order reads as follows:

> "The Writ of Habeas Corpus come on for hearing January 4 and January 5, 1990 for evidentiary hearing pursuant to previous order therefor issued by Judge Bert B. Bailey on July 12, 1989.
>
> "Oral documentary evidence was introduced; the court took judicial notice of all declarations and all proceedings held in this case. This included, among other things, the transcript of the preliminary hearing, the trial transcript, the transcript of the hearing held on a previous Writ of Habeas Corpus on November

18, 1988 and the Supreme Court opinion in this case, 41 Cal.3d 29.

"Petitioner alleges in this writ that he should be granted a new trial on the guilt phase on the grounds that he was denied discovery and alleged presentation of false testimony of Sharon Colman knowingly produced by the district attorney.

"The defendant specifically asserts that he was denied discovery of the following evidence:

1. Tape recorded interview of Sharon Colman;

2. A list of 84 witnesses;

3. A police report about a "shootout";

4. A police report about Ron Rose's money;

5. Santa Maria Police Department reports.

"Defendant contends that neither he nor his attorney received before trial the transcript of the taped interview of Sharon Colman with the district attorney, Officer Flores, Officer Seymore and her attorney, Thomas C. Peterson.

"Paul Martin testified that he does not remember having the tapes or transcript and is certain he would have used it to discredit Sharon Colman's testimony, if he had had it. He also testified the same as to the list of 84 witnesses.

"Memories fade in ten years. Mr. Martin, now a superior court judge, has had many cases both as an attorney and as a judge since that time. He admittedly could not recall most details of his reasoning and which materials he had at the time of trial. The defendant testified November 18, 1988 during the hearing on the preceding Writ of Habeas Corpus that he heard the tapes before the trial in Superior Court. R. T. Nov. 18, 1988, pg. 95: L. 1-26; pg. 96: L. 1-24.

"If the defendant heard the tapes then so did Judge Martin. The method of numbering is also persuasive that Mr. Phillips and his attorney had the transcript of the tapes. Therefore, the court finds that defendant and Judge Martin did have the tapes before the trial. However, that is not actually of great importance since Colman's testimony in the preliminary hearing and trial was the same. Ms. Hart argues that there was one conflict in the transcript and her testimony. The conflict, if any, was insignificant and no prejudice could have ensued.

"The defendant further argues from testimony of Mr. Thomas Peterson that a deal was communicated to Sharon Colman and that the Supreme Court did not have that information before it when it decided the case. Peterson testified that even though Sharon Colman accepted the deal he never assured her it was irrevocable, i.e., it could be changed. He represented Sharon Colman only about two months at which time she hired Cassandra Dunn to represent her. Cassandra Dunn testified at the

trial that there was no deal communicated to Sharon Colman. This was about sixteen months after the tapes were made and after Peterson was replaced. She was not called nor impeached by any competent evidence.

"Judge Martin in closing arguments talked about a Ideals; he argued blackmail by the district attorney in holding a first degree murder charge over Colman's head. Clearly her credibility because of a 'deal,' and a pending murder charge was put before the jury, and, as stated by the Supreme Court, the jury had sufficient facts with which to evaluate Sharon Colman's testimony.

"If there was a plea bargain communicated to Sharon Colman it was, in the court's opinion, not prejudicial beyond a reasonable doubt. Certainly it would not have even come close to changing the result.

"The list of 84 witnesses is a non issue. Judge Martin testified he received a list of witnesses before the trial but that he didn't remember it being that many witnesses. At the trial, Reporter's Transcript on Appeal, Vol. II, pg. 511: L. 12-15, Mr. Martin stated to the trial court that he received a list of 200 witnesses. Therefore that is a closed issue and could not have affected the result anyway.

"The court finds that the defense did have the police report about the so called Shootout told to a Doctor Reville by Sharon Colman

(Petition for Writ, Exhibit C. l. Sgt. Fore's Police Report dated 12/30/77). It was available to the defense. It is not surprising that it was not pursued in view of the theory of defense, namely, alibi. By hindsight defendant may wish he had used a different defense. Also if you read Sharon Colman's testimony together with other evidence there is no foundation to support her alleged statement to Dr. Reville. The court finds beyond a reasonable doubt that it was not prejudicial.

"The existence of S162.00 on the victim is also a non issue. There was a picture of burned money presented to the jury and counsel for defendant clearly understood that substantial money remained on the victim Ron Rose. It could have been argued any way defendant chose. It is the court's recollection that it was not argued by the defense.

"The court further finds that the police report consisting of 11 pages from the Santa Maria Police Department was furnished to defendant's counsel.

"The court is satisfied that the defendant received a fair trial during the guilt phase; that he received due process. The court finds that any error committed was harmless beyond a reasonable doubt and therefore orders the Writ of Habeas Corpus filed November 18, 1988 to be denied."

Dated 8 February 1990, signed by the Honorable W.J. Harpham, Judge Assigned. (Exhibit 1.)

C. On 10 August 1990, Phillips filed a third petition for writ of habeas corpus in the Fifth District Court of Appeals (F014410) attacking the denial by the superior court of his second habeas corpus petition.

In this third petition, Phillips urged that the superior court had erred in its findings by failing to credit attorney Martin's testimony that he had not received the exculpatory evidence because any competent attorney who had such evidence would have used it at trial and attorney Martin did not present the shoot-out evidence or theory at Phillips' guilt trial.

In the alternative, petitioner urged that if attorney Martin had received the exculpatory shoot-out evidence as the superior court had found in the habeas corpus proceeding, attorney Martin was constitutionally ineffective for failing to use the shoot-out evidence at Phillips' trial.

Petitioner relied upon attorney Martin's testimony in the superior court habeas corpus hearing that he would have presented evidence of a shoot-out as an alternative defense at Phillips' guilt trial to rebut the possibility that the failure to present a shoot-out theory at trial resulted from a tactical decision.

Petitioner further urged that if the testimony of defense attorney Peterson is credited, both District Attorney Minier and Colman testified falsely at Phillips' trial regarding Colman's knowledge of her receipt of consideration from the prosecutor in return for her testimony against Phillips.

On 16 August 1990, the Fifth District Court of Appeals issued a stay order on the pending penalty phase trial.

The California Attorney General filed a response which included a declaration from attorney Martin (Exhibit 2) retracting his prior testimony at the habeas corpus hearing relied upon by Phillips in his third petition. Contrary to his testimony at the evidentiary hearing upon the second petition,

attorney Martin stated in this declaration that he would not have presented evidence of a shoot-out as an alternative defense at trial. However, attorney Martin repeated in this declaration his prior testimony that he did not in fact receive the shoot-out evidence from the prosecutor.

The Attorney General's Response also included a declaration of Colman stating there was not a shoot-out between Phillips and Rose and that she made the statements to Dr. ReVille which indicated that there was a shoot-out because Phillips told her to do so.

Petitioner filed a traverse.

On 9 May 1991 the Fifth District Court of Appeals denied the petition for writ of habeas without opinion and vacated its stay order.

D. About 20 May 1991, Phillips filed a Petition for Review of the Fifth District's denial of his third habeas corpus petition in the California Supreme Court.

In his petition for review, Phillips urged that the Court of Appeal erred in concluding that attorney Martin effectively represented Phillips in his capital murder trial because Martin (1) failed to present an alternative defense to the special circumstance allegations of murder in the perpetration of robbery based upon evidence that Phillips did not kill to rob the victims and (2) failed to present an alternative defense based upon a shoot-out between Phillips and the victims.

Phillips also urged in this petition that the Court of Appeal should have ordered an evidentiary hearing before resolving critical factual issues against him based upon new declarations filed in the Court of Appeal.

On about 17 July 1991, the petition for review was denied without opinion or hearing.

E. On 16 August 1991, Phillips filed a fourth habeas corpus petition was in the Madera County Superior Court.

This petition raised the following issues:

(1) Trial counsel Paul R. Martin provided constitutionally ineffective assistance of counsel because he failed to present the defense at trial that Phillips did not commit a murder in the perpetration of a robbery as required for the jury to find the only alleged special circumstance to be true. Petitioner urged that attorney Martin should have argued that even if the jury decided that Phillips shot the victims, the prosecution evidence also shows that his crime was robbery incidental to a murder rather than a murder in the perpetration of robbery.

(2) Trial counsel Paul R. Martin provided constitutionally ineffective assistance of counsel because he failed to discover or use in his investigation of Phillips' case and trial the fact that the police autopsy photographs, which were provided to attorney Martin, show that the homicide victim Bartulis was shot either from his lower left or upper right. From either angle, Phillips could not have shot Bartulis from the position in which prosecution witnesses put him when

Bartulis was shot, and, therefore, the actual shot which killed Bartulis was fired by Rose.

(3) The people in bad faith allowed the destruction of material physical evidence--the vehicle in which the victims were shot. The victim's truck had obvious exculpatory value that was apparent prior to its destruction.

On 30 August 1991, the trial court entered a minute order denying the fourth habeas corpus petition which reads as follows:

> "In considering the above Writ of Habeas Corpus the Court takes judicial notice of the transcript of the preliminary examination, the jury trial and the transcript of the Writ of Habeas Corpus in the Superior Court before Judge Bert Bailey. The Court also considered evidence of the preceding on the Writ of Habeas Corpus conducted before this Court on or about January 4, 1990.
>
> "In addition to the foregoing, this court considered the points and authorities filed by each side in the proceeding on the Writ of Habeas Corpus before the Court of Appeal, Fifth District. Finally, the Court considers the points and authorities, and arguments presented by petitioner in the present proceeding.

"Petitioner's latest writ is predicated on the theory that he received ineffective assistance of counsel for, among other things, failure to investigate and use facts arising from the trajectory of bullet entry Petitioner asserts that this issue has not previously been presented nor ruled upon because he was prevented from inspection of the victim's vehicle which might have shown bullet impressions/trajectory.

"The Court is satisfied that this latest theory as to ineffective assistance of counsel has, along with other theories advanced by petitioner, been ruled upon either directly or impliedly by the three levels of courts to which writs have heretofore been directed.

"The Court also finds, however, that there is no credible evidence that law enforcement or the District Attorney's office destroyed the victim's vehicle in bad faith or that it would be likely to change the result or support the defendant's the case any more than argued at the trial regarding the angle and entry of the bullet as to Bartulis. The exculpatory value the evidence must be apparent before the evidence is destroyed. It must be shown that the police/District Attorney knew the evidence would exculpate defendant when they failed to preserve the evidence in question. (Footnote pg. 336, Arizona v. Youngblood - 109 S.Ct. 333 [1988]).

"Therefore, pursuant to rule 260(e) of the Superior Court the writ of habeas corpus filed August 16, 1991 is hereby denied and request

for stay of pending trial is denied."

DATED: August 30, 1991 (Signature)

F. On about 13 September 1991, Phillips filed his fifth petition for writ of habeas corpus in the Fifth District Court of Appeals (F016599).

In his fifth petition, Phillips urged that the superior court had erred in its factual findings, that Phillips had made a prima-facie case for relief in the superior court, and that the issues had not been raised in prior petitions as the superior court had found.

On 18 September 1991, the Court of Appeal denied the fifth petition without opinion or hearing.

G. On about 18 September 1991, Phillips filed his sixth petition for writ of habeas corpus as an original proceeding in the California Supreme Court. This petition was basically the same as the fifth petition filed in the Court of Appeal described in Item F above.

On 23 September 1991, the petition was denied without opinion or hearing.

7. A partial explanation for-the complexity of the state habeas corpus proceedings follows:

The assertion that attorney Martin was ineffective for failing to attack the special circumstance allegation was first clearly raised in Phillips' Petition for Hearing in the California Supreme Court. There was no apparent need for this assertion until attorney Martin filed a declaration as part of Respondent's Opposition in the Fifth District Action No. F014410. In his declaration, attorney Martin recanted his sworn testimony given on 4-5 January 1990 to the effect that he would have presented a shoot-out defense if he had received evidence to support such a defense.

Presentation of the autopsy evidence issue was delayed for the following reasons:

Petitioner personally reviewed numerous photos, including those of the autopsy and of the vehicle, for the first

time in 1989. Prior to this, review of the photographs was conducted, if at all, by his various appointed counsel.

After petitioner took these photos back to his cell at San Quentin, he closely reviewed their contents, and discovered a disparity between the corner's testimony at his trial and what the photographs disclosed regarding the path of the bullet which killed Bartulis.

When petitioner brought this issue to the attention of his various appointed counsel, they each advised him that he should pursue the location of the vehicle to affirmatively establish the trajectory of the entry/exit wound in Bartulis.

Thereafter, petitioner actively attempted to determine the whereabouts of this vehicle because he knew that no counsel or investigator representing him had ever inspected the victim's vehicle.

Petitioner's efforts to locate the vehicle included filing a motion for discovery in Madera County Superior Court, tracking down disposition of the vehicle through the California

Department of Motor Vehicles, and locating the tow truck operator who moved this vehicle at the behest of Madera County law enforcement. All of this information was discovered after the Madera County District Attorney's office indicated to the court that it could not account for the disposition of the truck and related evidence.

8. On about 23 September 1991, jury selection for commenced for petitioner's penalty retrial before the Hon. W.J. Harpham, assigned by the Chairperson of the California Judicial Council. On 6 November 1991 the jury returned a recommendation of a sentence of death.

9. Petitioner filed a motion for a new trial based on new acts of prosecutorial misconduct. On 21 February 1992, the new trial motion was denied.

10. Petitioner is scheduled for formal sentencing on 13 March 1992.

11. The judgment convicting petitioner of murder with special circumstances is final in California courts. Petitioner

believes that he cannot obtain further review of the adjudication of guilt by either direct appeal of right or discretionary writ petition in California courts. (See, Declaration of attorney Donald Horvath, Exhibit 3, 1 6.) The only remaining California decision is whether I will be sentenced to death or life imprisonment without possibility of parole--the two possible sentences for the crime of which I stand finally convicted as to guilt.

12. A exhibits to this petition which are not original documents are true copies of the documents they purport to be.

CLAIMS FOR RELIEF

1. INTRODUCTION

Petitioner Richard "Speed" Phillips was convicted of murder and attempted murder of two Southern California building contractors Bruce Bartulis and Ronald Rose The prosecution's star witness was Sharon Colman. Colman was Phillips' girlfriend and was present at the crime scene.

Materials discovered after Phillips' automatic appeal disclose the following:

1. The prosecutor did not give Attorney Paul R. Martin Officer Fore's report and the 28 December 1977 Colman transcript (of her interview with law enforcement) before Phillips' guilt trial.

2. The prosecutor David Minier and his star witness Sharon Colman both testified falsely at Phillips' guilt trial.

3. Attorney Martin did not effectively represent Phillips in his capital murder case.

4. The prosecutor violated Phillips' right to due process of law by destroying material evidence -- the victim's truck -in base faith.

2. **CLAIMS**.

The grounds upon which Phillips contends he is being held unlawfully in violation of the Constitution of the United States are a, follows:

A. **The Prosecutor's Failure To Disclose Material Evidence With Obvious Exculpatory Value.**

Phillips' Fifth, Eighth and Fourteenth Amendment rights were Violated by the combined actions of the prosecutor and Madera County law enforcement in failing to comply with the trial court s discovery order.

The following facts support this claim:

1. Sharon Colman, the key prosecution witness, made a statement to Dr. Donald ReVille (ReVille), Phillips' brother-in-law, concerning the manner in which the shooting of the victims occurred. Dr. ReVille related this statement by Colman to Officer Fore of the Madera County Sheriff's office, who wrote a police report dated 30 December 1977 (Exhibit 4) which stated in part:

"On arrival at his office, Dr ReVille told R/O, when Colman talked to him earlier that week, she told him Richard Phillips replaced a window shield in the Brown Toyota. R/O asked the doctor how the front window was broken out. He explained, Sharon told him once they met the two other guys, *both parties shot at each other at the same time, shooting out the window shield on the Toyota.*" (Exhibit 4; emphasis added.)

2. Madera County law enforcement officials conducted a taped interview with Sharon Colman on 28 December 1977. (Exhibit 5.) In this interview, Colman made numerous statements that were contradictory to her subsequent testimony at petitioner's trial as shown in the attached brief.

The most important discrepancy is that in her 28 December 1977 statement, Colman said the first thing Phillips did after the shooting (except hitting Bartulis in the head with his gun) was to reach into the Ranchero and get Rose's gun. (Exhibit 5, pp. 73-74;; page references for this exhibit are to handwritten numbers in the lower right hand corner.) In her trial testimony Colman stated that the first thing Phillips did after the shooting (except hitting Bartulis in the head with his gun) was to reach into the Ranchero and remove the wallet of Bartulis.

The fact that after the shootings petitioner first reached for Rose's gun supports a shoot-out theory of the crime. However, the fact that petitioner first reached for the victim's

wallet would support the prosecutor's theory that the killing was for purpose of robbery.

3. These reports were never made available to the defense. (First Declaration of Attorney Paul Martin (Exhibit 6) ¶ 6; Exhibit 2 ¶¶ 4, 5; Declaration of Phillip Gerkhe (Exhibit 7) ¶ 3.)

4. The Prosecutor and Madera County Law Enforcement deliberately destroyed the victim's truck, which was material exculpatory evidence because it could establish that there was a shoot-nut between Petitioner and Rose, in bad faith.

B. <u>The False Testimony of District Attorney Winier And Sharon Colman</u>.

Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated by the combined actions of the prosecutor and star prosecution witness Colman in testifying falsely at petitioner's trial regarding the substantial benefits conferred by the prosecutor upon Colman for

testifying against Phillips and failing to disclose the existence of such benefits to the defense prior to trial.

The following facts support this claim:

1. Immediately after her arrest. Colman was represented by Thomas Peterson (Peterson)

2. Years after his trial petitioner learned for the first time that, contrary to the testimony of both Colman and prosecutor Minter at his trial, Peterson had negotiated a deal for Colman in return for her testimony against petitioner. (Declaration of Attorney Thomas Peterson (Exhibit 8) 1 9.)

3. Attorney Peterson stated at paragraph 9 of his declaration dated 5 January 1987:

> "9. The agreement struck was that if Sharon Colman testified against Mr. Phillips implicating him in the murder and attempted murder charges she was to receive a plea to Penal Code 32 with a maximum of Probation and no more that (sic "than") one year in Madera County Jail. I did communicate this to Sharon Colman and she accepted. As I recall Sharon did question why she had to spend time in jail if she cooperated. I specifically recall her parents making some comment to me that why

should their daughter who was not guilty have to plead to anything when she was going to testify for the prosecution." (Emphasis added.)

4. The deal for Colman's testimony was never disclosed to

to the defense prior to trial. The jury never heard about this plea bargain for Colman's testimony against Petitioner.

5. On 4 January 1990, attorney Peterson testified that the plea bargain stated in the above quotation was struck with District Attorney Minier. (Reporter's Transcript, Exhibit 9, pp. 43-44.)

6. Madera County District Attorney Vinier testified at Phillips' trial as follows:

"Q. now on any of these occasions, did you suggest to Miss Colman that there would be any leniency if in fact she testified.

"A. No.

"Q. Did you make any inferences that if in fact she testified. things would go better for her?

"A. No.

"Q. Did you in and way communicate to Miss Colman that there would be any benefit to her in any way of testifying in this matter?

"A. No." (Guilt Trial Transcript, Exhibit 10, p. 324; emphasis added.)

4. Colman testified at Phillips' trial as follows:

"Q. And you expect to receive some benefit for testifying here today?

"A No.

"Q. You don't expect to receive any consideration whatsoever for testifying?

"A. I'm hoping that there will be consideration but -

"Q. You really expecting to receive some consideration?

"A. Are you asking me if I have been promised or is that -

"Q. I'm asking you for your expectation.

"A. I'm expecting that they would take into consideration that I am willing to cooperate." (Exhibit 10, pp. 223-224.)

7. The testimony of District Attorney Minier and Colman is in direct conflict with attorney Peterson's testimony

upon the issue of whether Colman was aware that she had been offered consideration from the prosecutor for testifying against Phillips.

8. If attorney Peterson's testimony is credited, Minier's trial testimony that he did not Shin any way communicate to Miss Colman that there would be any benefit to herr for testifying against Phillips is false because Minier communicated a plea bargain to Colman through Peterson, her then attorney of record.

9. If attorney Peterson's testimony is credited, Colman's trial testimony that she did not receive any hard consideration, such as a favorable plea bargain, from the prosecutor for testifying against Phillips is false because Colman accepted the District Attorney Minier's offer communicated by attorney Peterson of a section 32 plea in return for her testimony. was called off prior to her testifying against Phillips.

10. Phillips was prejudiced by the combined actions of the prosecutor and Colman as follows:

a. Because of the failure of the prosecution to disclose this information, the Phillips' guilt jury was not informed of important information regarding:

1. Colman's expectation of leniency and consideration from the prosecution in exchange for her testimony.

2. The prosecution's negotiations with Colman and Colman's attorney regarding the nature, timing and extent of the benefits conferred upon Colman.

3. Colman's continuing expectation of leniency which extended beyond the trial.

4. Significant impeachment of Colman's false testimony that she did not expect any reward for her testimony.

b. As a result of the failure to disclose this information, Phillips was also prejudiced in that:

1. Phillips was deprived of important information which was material to his defense.

2. Phillips was unable to introduce the information concerning Colman's expectation and receipt of an actual specified deal for her testimony and was thereby deprived of the opportunity to impeach Colman's FALSE testimony, as well was the FALSE testimony of the District Attorney himself.

11. As a result of this prejudice, it is reasonably probable that the result of the guilt phase trial would have been a verdict of a lesser degree of homicide or a finding that the special circumstance alleged was not true.

Colman's testimony included statements which, if believed by the jury, constituted strong evidence on the crucial issue of intent. Had defense counsel been aware of the undisclosed information, he could have presented evidence and argument that would have reduced Colman's credibility.

C. Ineffective Assistance of Counsel At Trial.

Petitioner's counsel rendered ineffective assistance of counsel regarding the guilt phase of trial in violation of

Petitioner's Sixth and Fourteenth Amendment right when he unreasonably failed to adequately investigate and present facts supporting a legal defense to the crimes to Petitioner's substantial prejudice.

The following facts support the claim that Attorney Martin did not effectively represent Phillips in his capital murder case:

1. Attorney Martin failed to adequately investigate or present the potentially meritorious defense that the special circumstance allegation that Phillips killed Bartulis with premeditation during a robbery is not true because Phillips actually shot at the victims for reasons other than robbery--that the crime was a robbery in the perpetration of murder rather than a murder in the perpetration of robbery. (For California standard see, *People v. Green* (1980) 27 Cal.3d 1, 59-62, 164 Cal.Rptr. 1 [robbery incidental to a murder will not support a robbery special circumstance finding].)

This defense is supported by evidence that immediately after the shooting Phillips told Colman that he shot at the victims because he thought they had set him up and/or for reasons related to Phillips' cocaine deal with the victims.

2 Attorney Martin failed to adequately investigate or present the potentially meritorious defense that the killing of Bartulis resulted from a shoot-out between petitioner and victim Rose which was initiated by Rose.

The shoot-out theory of the crimes is supported by Colman's preliminary hearing testimony that during the ride to Sacramento immediately after the shootings petitioner told Colman that his motive for shooting the victims was related to a cocaine deal, which would tend to negate robbery as the reason for the killing of Bartulis. It is also supported by the autopsy evidence that petitioner actually shot Bartulis discussed in Point 3 below.

The day of the crimes Tamera Nichols saw Graybill come home extremely upset. Graybill told Nichols that a

business deal had gone sour and ended in a shoot-out; Graybill said "all of a sudden both parties started shooting at each other." (Declaration of Tamera Nichols, Exhibit 11, ¶ 3.)

Gary Bishop was driving the truck with stolen property which the victims were to have purchased from Graybill. (Declaration of Gary Bishop, Exhibit 11, ¶ 4.) The morning after the crime, Bishop heard Graybill say he was present at the crime scene and "all hell brake loose." (Exhibit 11, ¶ 6.) Later, Bishop heard Graybill say several times that Phillips was lucky to have survived. (Exhibit 12, ¶ 8.)

Petitioner believes adequate investigation of available shoot-out evidence would have led attorney Martin to discover the testimony of Nichols and Bishop as stated in Exhibits 11 and 12.)

3. Attorney Martin failed to adequately investigate or present the potentially meritorious defense that available prosecution evidence shows that Rose actually shot Bartulis. The fact that Rose apparently shot Bartulis should suggest to

a reasonable defense counsel the possibility of a shoot-out between Rose and his assailant with Bartulis caught in the middle. Such a shoot-out would tend to negate a premeditated murder for purpose of robbery.

Autopsy photographs of Bartulis showing the path of the single fatal bullet shows that the bullet either entered Rose from the right side of his chest at about a 10-15 degree down angle or entered at his left rib cage. For petitioner to have shot Rose from his location at the driver's window of the victim's truck, the left rib wound had to be the entry rather than exit wound. However, the angle of the bullet is such that the gun would have to have been held below the driver's door for the rib would to be the entry wound.

Edward Bates was Sheriff/Coroner of Madera County when Bartulis was killed. Bates inspected the victim's truck shortly after the crime. Based upon this investigation and the autopsy photographs of Bartulis, Bates is of the opinion that tithe rods shown in the photographs of the victim's corpse are

not consistent with a conclusion that the wound in the victim's rib area was the entrance wound assuming that the fatal shot was fired from outside of the driver's side window (Declaration of Edward Bates, Exhibit 13, ¶ 7-)

The ballistics evidence regarding the path of the fatal bullet does not require this court to believe Phillips' statement that he shot at Rose and Bartulis during a shoot-out. However, the ballistics evidence strongly corroborates Phillips statement that he was engaged in a shoot-out with Rose. If Bartulis was shot from his right side, there is no other reasonable explanation for this fact except that Bartulis was shot by Rose.

The issue raised by the ballistics evidence is not whether attorney Martin must affirmatively seek evidence of a shoot-out. Rather, the issue is whether he must LOOK at available prosecution evidence and SEE that it shows Rose shot Bartulis. Upon the evidence available to attorney Martin, the applicable California State law required him to investigate possible alternative defenses to the proposed alibi defense.

Attorney Martin attempted to perform his duty as defense counsel in a capital murder case by giving Phillips copies of the police reports and then asking Phillips for his version of the events. In this manner, attorney Martin placed the burden of coming up with a viable defense upon Phillips, the criminal he was hired to defend, and essentially abdicated the duties of defense counsel.

3. Attorney Martin's actions and omissions described above were not and could not have been the result of any sound strategic decisions.

4. Two criminal defense lawyers experienced in capital cases are of the opinion:

(1) that the alibi defense was hopeless and attorney Martin should have forcefully so informed Phillips;

(2) that attorney Martin should not have allowed petitioner to testify to an alibi defense unless he insisted upon doing so after being advised that it was hopeless;

(3) that attorney Martin should have continued to investigate possible alternative defenses after Phillips said he was not present at the crime scene; and

(4) that the prosecution evidence available to attorney Martin suggested the two possible alternative defenses listed above. (Declaration of attorney Katherine Hart, Exhibit 14; Declaration of attorney Marshal Hodgkins, Exhibit 15.)

5. Phillips was substantially prejudiced by the above described failures of attorney Martin as follows:

a. Had counsel investigated the facts of the prosecution's evidence, along with seeking scientific and expert testimony, two viable defenses to the charges against Phillips could have been presented--(1) the crime did not occur in the commission of a robbery as alleged by the state; and (2) that during the course of a drug deal related shoot-out, it was actually the shot from Rose that killed Bartulis.

b. Instead of investigating and presenting the viable defenses described above, attorney Martin unreasonably

presented a hopeless alibi defense that was borne of desperation and had absolutely no chance of success.

c. If the proper defenses had been tendered, it is reasonably probable that a verdict of not true on the robbery special circumstance and a lesser degree of homicide would have been returned by the jury.

D. Bad Faith Destruction of Exculpatory Evidence.

1. Facts.

On 13 October 1989, the Madera County Superior Court granted petitioner formal discovery regarding what happened to the victim's Ranchero. (Exhibit 16, Item 1.)

The People responded that they basically lost this item, and had no adequate documentation of what happened to the item in question. (Exhibit No. 17.)

Through Petitioner's investigative efforts, the following information was developed:

Exhibit No. 18 is a true copy of George Hilton's declaration dated 31 July 1991.

Mr. Hilton's declaration indicates that he towed the vehicle to the State of California Criminalistic Crime Laboratory (DOJ) in Fresno, California upon request of Madera County Law Enforcement.

Exhibit No. 19 is a true copy of Frank Herget's declaration dated 2 August 1991

Mr. Herget's declaration indicates that it is DOJ's normal practice to accept an automobile for evidence processing only from a representative of a law enforcement agency and to return the evidence to law enforcement after it has been processed by DOJ.

Mr. Herget also stated that if a vehicle is processed and examined by DOJ a report is made by that agency. As of this date, the prosecution has not provided the defense with a copy of a DOJ report of their processing of the truck.

On 3 August 1990, the Honorable W.J. Harpham signed an order instructing the Department of Motor Vehicles (DMV) to conduct the necessary search to ascertain the final

disposition and/or whereabouts of the vehicle in question. (Exhibit 20.)

Exhibit No. 21 is a true copy of a DMV Application for Lien Sale Authorization and Lienholders Certification.

Exhibit No. 21 indicates that the vehicle was transferred from the DOJ to an automotive storage facility, Automotive Pool of Fresno, 4389 N. Motel Drive, Fresno, CA on 12 January 1978.

Exhibit No. 22 is a true copy of a DMV Additional Instructions for Lien Sale of a Vehicle valued at $200 or Less

Exhibit No. 22 indicates that Automotive Pool of Fresno, Inc. attached a lien on the vehicle in question, for storage fees. This was done through it's agent, Evelyn's DMV Service, 2720 S. Union Ave., Bakersfield, CA 93307

Exhibit 22 also indicates that the title of this vehicle was transferred to Mercury Casualty, P.O. Box 6467, San Jose, CA 95150 from the registered owner, Denise M. Rose, 227 S. Ashdale, West Covina, CA 91790; and the legal owner, Wells

Fargo Bank, Auto Lease Center, P.O. Box 816, Anaheim, CA

Exhibit No. 23 is a true copy of DMV Notice of Pending Lien Sale Form.

Exhibit No. 23 indicates that the registered and legal owners were notified on or about 10 January 1979 that the vehicle in question would be sold to satisfy the lien held by Automotive Pool of Fresno, Inc. on 20 February 1979.

Exhibit No. 24 is a true copy of a DMV Statement of Facts

form.

Exhibit No. 24 indicates that all parties had approximately 36 days notice of the pending sale of the vehicle in question, and no one moved to prohibit said sale.

Exhibit No. 25 is a true copy of a DMV Bill of Sale form.

Exhibit No. 25 indicates that the vehicle in question was sold on 20 February 1979 by Automotive Pool of Fresno, Inc., to Bill Long Used Cars; and on 18 August 1979 to Bill Long

Auto Dismantling from Bob Long Used Cars.

Exhibit No. 26 is a true copy of a DMV Report of Vehicle to be Dismantled form.

Exhibit No. 26 indicates that on 18 August 1979 Bill Long Used Cars filed with the DMV to dismantle the vehicle; and Bill Long Auto Dismantling filed a Dismantler's Notice of License Plate Destruction.

Exhibit No. 27 is a true copy of a Declaration by Pam Maestas, Custodian of Records for the DMV.

Exhibit No. 27 indicates that all documents from the California Department of Motor Vehicles are true and correct copies of the original records on file with the California Department of Motor Vehicles.

Petitioner believes that it reasonably can be inferred from Exhibits 18 through 27 that law enforcement had custody of the victim's truck, examined it at DOJ without report to petitioner, and thereafter released the truck for destruction without notice to petitioner's counsel.

Upon information and belief, neither petitioner nor his lawyer at the time received notice of intent to destroy the victim's truck.

Upon information and belief based upon statements of Denise M. Rose, the victim's wife, the vehicle was released from the custody of law enforcement by district attorney David Vinier.

Petitioner believes that two shots were fired from inside the vehicle. This belief is based upon the fact that petitioner later discovered two empty shell casings in Rose's .44 revolver.

Petitioner believes that the two rounds were fired in his direction because (1) a bullet hole found in the windshield of his car which was located behind him and (2) the position of the gun in Rose's hand and the direction his hand was pointed when petitioner removed the weapon from inside the vehicle. (See, Declaration of Richard Phillips, Exhibit 28, ¶ 34.)

VERIFICATION.

I, Richard L.A. Phillips, say:

I have single copies of the photographs which I have drawn the aforementioned allegations from, relating to the angle of the bullets, the autopsy, and the destroyed vehicle. These are my only copies I would be willing to make these available for review upon request.

I am the petitioner in this action; the above document is true to my own knowledge, except as to matters that are stated in it on my information and belief, and as to those matters, I believe it to be true.

Executed-on 28 February 1992 at Madera, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/

Richard Phillips
In propria persona

PRAYER.

WHEREFORE, Petitioner prays this honorable court:

1. Issue a writ of habeas corpus to have Petitioner brought before it to the end that he might be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional judgment convicting him of murder with special circumstances.

2. Conduct a hearing at which proof may be offered concerning the allegations in this petition;

3. Permit Petitioner, who is indigent, to proceed without prepayment of costs and fees; grant him permission to proceed in propria persona; grant him authority to obtain subpoenas without fee for witnesses and documents necessary to prove the facts alleged in this petition; and grant him sufficient funds to secure expert testimony necessary to prove the facts as alleged in this petition;

4. Require the Respondents to bring forth the entire state court record so that this court can review those parts of

the record that are relevant to the issues and defenses raised in this proceeding;

5. Stay all California court proceedings against Petitioner pending final disposition of this petition; and

6. grant such other and further relief as may be appropriate.

DATED: 28 February 1992

Respectfully submitted,

/s/

Richard Phillips

PROOF OF SERVICE

I am employed in the County of Fresno, State of California. I am over the age of eighteen and not a party to the within action. My business address is 1713 Tulare, Suite 137, Fresno, Calif. 93721.

On March 3, 1992, I served the within BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS on the interested parties by placing a true copy thereof in a sealed envelope, with postage fully prepaid and placed in the United States mail at Porno. California, addressed as follows:

M.A. HAHN, DIRECTOR, MADERA
COUNTY DEPT. OF CORRECTIONS
14191 ROAD 28
MADERA, CA 93638

STATE ATTORNEY GENERAL
555 CAPITOL MALL
SACRAMENTO, CA 95814

I declare under penalty of perjury that the foregoing is true and correct.

DATE: March 3, 1992 /s/_____
ANN BULAICH

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX N

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Deputy Attorney General
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Telephone: (916) 324-5281
Counsel for Petitioners

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
U.S. COURT HOUSE ROOM 5408
130 O STREET
FRESNO, CALIFORNIA 93721

Date: April 16, 1992

Reply to: K. Phillips, Civil Docketing - (209) 487-5037 (FTS#467) Eastern District of California at Fresno

Subject: New Appeals Docket Information

To: CLERK, U.S. COURT OF APPEALS
121 Spear Street
PO Box 193939
San Francisco, CA 94119-3939

AMENDED CASE INFORMATION

CASE TITLE: RICHARD LOUIS ARNOLD PHILLIPS
-v- DANIEL VASQUEZ

USDC CASE # CV-F-92-5167-REC-P
TYPE OF CASE: Civil
COURT REPORTER None
DOCKET FEE PAID: No.

USDC JUDGE: RE Coyle
COMPLAINT FILED: 3/4/92
APPEAL ORDER FILED 3/12/92
NOTICE OF APPEAL FILED: 4/10/92

Was Appellant granted IFP at trial? No
Was IFP status revoked? Date:
Was IFP status limited? If yes, explain:

Plaintiff/APPELLANT COUNSEL

Richard Louis Arnold Phillips
In Propria Persona
PO Box C-13707
Tamal, CA 94964

Defendant/APPELLEE COUNSEL

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Sacramento, CA 94244-2550
(916) 445-9555

Criminal counsel is: () Fed Dfndr () CJA
() Retained () Apptd

ACKNOWLEDGMENT OF RECEIPT BY APPEALS COURT

DATE RECEIVED: _____ BY: _____

CASE NUMBER ASSIGNED: _____

APPEAL NOTIFICATION FORM

TERMED APPEAL

U.S. District Court
EASTERN DISTRICT OF CALIFORNIA (Fresno)

CIVIL DOCKET FOR CASE #: 92-CV-5167

Phillips, et al v. Hahn, et al Filed: 3/4/92
Assigned to: Judge Coyle
Demand: $0,0000 Nature of Suite: 550
Lead Docket: None Jurisdiction: Federal question
Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

RICHARD LOUIS ARNOLD PHILLIPS
Plaintiff

Richard Louis Arnold Phillips
[COR LD NTC] [PRO SE]
P O Box C-13707
Tamal, CA 94964

v.

M A HAHN, Director Madera
County Dept of Corrections
defendant
[term 04/16/92]

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[term 04/16/92]
[COR LD NTC]
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DANIEL B VASQUEZ
defendant

California State Atty General
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Suite 511
PO Box 944255
Sacramento, CA 94244-2550
(916) 445-9555

INTERNAL USE ONLY: Proceedings include all events TERMED APPEAL

1:92cv5167 Phillips, et al v. Hahn, et al

3/4/92	--	LODGED Application For Forma Pauperis (Not used - not required in death penalty cases) (PP) [Edit date 03/13/92]
3/4/92	1	PETITION FOR WRIT OF HABEAS CORPUS (gl) [Entry date 03/13/92]
3/4/92	2	APPLICATION by plaintiff for stay of further proceedings in the Madera Superior Court (gl) [Entry date 03/13/92]
3/12/92	3	MEMORANDUM in support of application [2-1] (gl) [Entry date 03/13/92]
3/12/92	4	ORDER by Judge Coyle denying application for stay [2-1], denying habeas corpus petition [1-1] terminating case (cc: all counsel) (gl) [Entry date 03/13/92]
3/12/92	5	JUDGMENT entered in favor of the respondent and against the petitioner (cc: all counsel) (gl) [Entry date 03/13/92]
3/12/92	6	NOTICE OF APPEAL by plaintiff from Dist. Court order/judgment of 3/12/92 [4-2], [5] (fee status: not paid) (kp) [Entry date 03/13/92]
3/13/92	7	FAXED COPY of Appellate Court Order denying petitioner's emergency motion to stay state court proceedings (kp)
3/20/92	8	MAIL Returned [5-1] addressed to plaintiff Richard Louis Arnold Phillips: not in custody (caf)

4/10/92	9	LETTER to court from plaintiff re Notice of Appeal, myself -v- the head of Madera; and myself -v- the Warden of San Quentin, please file the appropriate one. (kp) [Entry date 04/13/92]
4/10/92	10	LETTER to court from plaintiff re I respectfully disagree with your assessment of the 3/12/92 appeal being dismissed; the court took it upon itself to address all three documents in one response (kp) [Entry date 04/13/92]
4/10/92	11	NOTICE OF APPEAL by plaintiff from Dist. Court decision [4-2] (fee status: not paid) (kp) [Entry date 04/13/92]
4/13/92	12	MAILED case information/docket fee payment notice, copy of Notice of Appeal and appealed 3/12/92 order/judgment to 9th Circuit Court of Appeals. Copy of appeal and certified copy of docket sheet to all parties. (kp)
4/13/92	--	LODGED Order setting bond on appeal (kp)
4/15/92	13	ORDER by Judge Coyle setting bond on appeal in amount of $ -0- (kp) [Entry date 04/16/92]

INTERNAL USE ONLY: Proceedings include all events
1:92cv5167 Phillips, et al v. Hahn, et al
TERMED APPEAL

4/16/92	14	MAILED AMENDED case information/docket fee payment notice, copy of Notice of Appeal and appealed 3/12/92 judgment to 9th Circuit Court of Appeals. Copy of appeal and certified of docket sheet to all parties. (kp)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF REVERSAL BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (BETTY B. FLETCHER, STEPHEN REINHARDT, AND ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX O

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

Petitioner and Appellant, 92-15828

v.

DANIEL B. VASQUEZ, Warden, San Quentin State Prison,

Respondent and Appellee.

On Appeal From An Order In A Habeas Corpus Proceeding

In The United States District Court
For The Eastern District of California
No. CIV-F-92-5167-REC-P

APPELLEE'S RETURN TO ORDER TO SHOW CAUSE

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499 U.S. ___,
113 L.Ed 517,
111 S.Ct. 1454 (1991)

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41 Cal.3d 29, 84,
222 Cal.Rptr. 127,
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BEST AVAIL

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARD LOUIS ARNOLD PHILLIPS,

Petitioner and Appellant, 92-15828

v.

EL B. VASQUEZ, Warden, San Quentin Prison,

Respondent and Appellee.

RETURN TO ORDER TO SHOW CAUSE

COMES NOW Respondent/Appellee, Daniel B. Vasquez, Warden of San Quentin State Prison, and makes this answer to the Order to Show Cause issued by this Court on December 2, 1993, in the appellate case of *Phillips v. Vasquez* No. 92-15828. Therein, this Court asked for a response to the following questions:

"(1) Each shall report on the status of any proceedings in respect to Richard Phillips convictions

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and sentence of death pending in the courts of the State of California.

"(2) Why should not this appeal be dismissed without prejudice as premature in that all proceedings in the state court had not been exhausted as of the time the petition was filed?

"(3) Why should not Richard Phillips make application in the state court for any materials, computer, investigations, etc. needed in aid of his appeals and habeas corpus review until a petition for habeas corpus is properly before this court?"

In answer to question (1), following the reversal of appellant's death sentence in *People v. Phillips*, 41 Cal.3d 29, 84, 222 Cal.Rptr. 127, 711 P.2d 423 (1985), appellant received a new penalty trial and again was sentenced of death. His automatic appeal (Cal. Pen. Code § 1239(b)) is presently pending before the California Supreme Court in *People v. Phillips*, No. S025880. On appellant's request for the appointment of counsel, appellant's advisory counsel in

the instant appeal pending before this Court, Donald J. Horvath, Esq., was appointed on April 19, 1993, to represent appellant in his automatic appeal before the California Supreme Court. Since that time, Mr. Horvath has applied for and received from the California Supreme Court six extensions of time to request correction of the record in the trial court, the latest being to December 23, 1993. The record on appeal has not yet been certified. Other than one request by appellant for a temporary transfer to the Madera County Jail from San Quentin Prison's death row to enable him to meet with his attorneys instead of them having to travel to San Quentin Prison to meet with him, which the California Supreme Court denied on August 11, 1993, respondent is unaware of any other pending matters related to appellant's pending automatic appeal before the California Supreme Court.

In answer to question (2), respondent submits that this appeal should be dismissed without prejudice as

premature since the state court proceedings have not yet been exhausted and, indeed, had not been exhausted when the petition was filed in the District Court. The closest case on point of which respondent is aware is *Hillery v. Sumner*, 496 F.Supp. 632, 637 (E.D. Cal. 1980), cited by this Court with apparent approval in *Hillery v. Pulley*, 733 F.2d 644 (9th Cir. 1984).[1/]

Therein, in discussing why Hillery's extensive delay in filing his federal habeas corpus petition challenging the racial makeup of the grand jury that initially indicted him was justified, Judge Karlton stated:

> "Although the California Supreme Court affirmed the guilt phase of petitioner's conviction in 1965, it reversed the death penalty imposed and remanded to the trial court for further proceedings. *People v. Hillery, supra*, at 713, 44 Cal.Rptr. 30, 401 P.2d 382. The appeal from the second penalty trial was not completed until 1967. *People v. Hillery* (1967) 65 Cal.2d 795, 56

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1. *Hillery* v. *Pulley* was affirmed sub. nom. in *Vasquez* v. *Hillery*, 474 U.S. 254 (1986).

Cal.Rptr, 280, 423 P.2d 208, *cert. denied*, 389 U.S. 986, 88 S.Ct. 486, 19 L.Ed.2d 496 (1968). In 1969, by writ, petitioner was successful in securing the reversal of the second penalty trial because of *Witherspoon* error. *In re Hillery* (1969) 71 Cal.2d 857, 79 Cal.Rptr. 733, 457 P.2d 565. At his third penalty trial, petitioner once again received the death penalty. In 1974, on automatic appeal to the California Supreme Court, the Court modified the penalty to life imprisonment. *People v. Hillery* (1974) 10 Cal.3d 897, 112 Cal.Rptr. 524, 519 P.2d 572. This protracted litigation in effect precluded federal court intervention. Had petitioner sought federal habeas relief while the state court litigation was continuing, considerations of comity and federalism would almost certainly have required dismissal. Both doctrines compel a respect for state functions and counsel against interference with ongoing state judicial proceedings. *Justice v. Vail* (1977) 430 U.S. 327, 335, 97 S.Ct. 1211, 1217, 51 L.Ed.2d 376; *Huffman v. Pursue, Ltd.* (1974) 420 U.S. 592, 601, 95 S.Ct. 1200, 1206, 43 L.Ed.2d 482; *Younger v. Harris* (1971) 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed 2d 669. Moreover, the California Supreme Court's determination on the guilt phase is unlikely to have induced a district court to hear petitioner's habeas since in this circuit, finality of one issue in the state courts is not generally sufficient to

circumvent the requirements of comity and federalism. *Drury v. Cox* (9th Cir. 1972) 457 F.2d 764, 765. Thus, it appears that at the earliest petitioner could not have filed in federal court until 1967 following the California Supreme Court's affirmance of the death penalty imposed at the second penalty trial, and perhaps not even until 1974 when the state litigation was finally resolved." (496 F.Supp. at 637.)

The rationale of Judge Karlton in *Hillery v. Sumner* is equally applicable to the instant case since appellant's automatic appeal following his second penalty trial is still pending before the California Supreme Court. This is especially true in this case. First, appellant's advisory counsel on the instant appeal is appellant's counsel on the appeal in the California State Court. Second, respondent has been led to believe that in counsel's duties of representing appellant, counsel may file state habeas corpus, and state habeas corpus is not limited solely to issues arising out of the second penalty trial.

(3) If this Court adopts respondent's position as to question No. (2), then, appellant's appeal being dismissed, there would be no pending federal habeas corpus case, and no cause for appellant to need "any materials, computer, investigations, etc." for use in any federal habeas corpus case in either the federal District Court or this Court. If appellant wishes to utilize such items on either his pending appeal or on habeas corpus in the California Supreme Court, that is something to be addressed by that state court, not this Court. Thus, this claim should also be denied.

Respondent/appellee recognizes that the dismissal of appellant's appeal would be without prejudice and that upon final resolution of this case by the California Supreme Court a subsequent habeas corpus petition filed by appellant in the federal court will not be treated as a successive petition under *McClesky v. Zant*, 499 U.S. ___, 113 L.Ed 517, 111 S.Ct. 1454 (1991).

CONCLUSION

For the foregoing reasons, the instant appeal should be dismissed without prejudice as being premature and appellant's request for "any materials, computer, investigations, etc." to perfect federal habeas corpus should also be denied.

Dated: December 23, 1993.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General.

ROBERT R. ANDERSON
Senior Assistant Attorney General

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Deputy Attorney General

EDMUND D. McMURRAY (State Bar #42[illegible]
Supervising Deputy Attorney General

Attorneys for Respondent/Appellee

EDM:msd
SA92FA0027

DECLARATION OF SERVICE BY MAIL

Re: Richard Louis Arnold Phillips v. Daniel B. Vasquez
No. CVF-92-5167-REC-P

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

RETURN TO ORDER TO SHOW CAUSE

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Donald J. Horvath
6592 North First Street
Fresno, CA 93710

Daniel B. Vasquez
Warden
San Quentin
California State Prison
San Quentin, CA 94964

Richard Lewis Arnold Phillips
P.O. Box C-13707
Tamal, CA 94964

Each said envelope was then, on December 23, 1993, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 23, 1993, at Sacramento, California.

_____

DECLARANT

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
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PETITION FOR WRIT OF CERTIORARI

APPENDIX P

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[HAND WRITTEN]

DEATH PENALTY CASE

RICHARD LOUIS ARNOLD PHILLIPS
Proceeding *pro se*
P.O. Box C-13707 5-E-71
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS	)	Case No. 92-15828
Petitioner,	)	DC No. CVF92-5167-REC-P
vs.	)	
DANIEL B. VASQUEZ, Warden San Quentin State Prison	)	
Respondent.	)	

PETITIONER'S RESPONSE TO
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[TYPED] DEATH PENALTY CASE

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS	)	Case No. 92-15828
Petitioner,	)	DC No. CVF92-5167-REC-P
vs.	)	
DANIEL B. VASQUEZ, Warden, San Quentin State Prison,	)	PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE
Respondent.	)	

TO: THE HONORABLE JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

PETITIONER'S RESPONSE

On 2 December 1993 this Court issued an Order to Show Cause in the above numbered case. This Order instructed Petitioner to respond to three (3) questions.

QUESTION #1: Each shall report on the status of any proceedings in respect to Richard Phillips convictions and sentence of death pending in the court of the State of California.

Subsequent to this Court appointing Donald J. Horvath as advisory counsel in the case at bar, Petitioner begged and cajoled Mr. Horvath into accepting appointment by the California Supreme Court in Petitioner's second automatic appeal.

The current status of this appeal is that there are points in the record which must be corrected. This may prove to be a long process, as we have some proceedings where the record states, "These pages missing. Report lost her notes."

There are no other proceedings before any other state courts.

QUESTION #2: Why should not this appeal be dismissed without prejudice as premature in that all proceedings in the state court had not been exhausted as of the time the petition was filed?

At the risk of incurring the wrath of the Court by sounding flippant, the simple answer

to Question #2 is that it is an incorrect statement. All proceedings related to the writ at bar were FULLY exhausted at the time the petition was filed.

Please indulge me as I take a moment to pitch the crux of my "amended" appeal which I recently submitted to advisory counsel for review.

I. FACTUAL BACKGROUND OF THE CASE

The factual background is fully set forth in the writ of habeas transferred to this Court as part of the record from the District Court, so Petitioner will only insert a brief recap.

On 20 February 1980 Petitioner was convicted of charges stemming from the 7 December 1977 killing of one man, and attempted murder of a second. The conviction was for first degree murder; attempted murder; and robbery, in Madera County Superior Court, State of California. Petitioner received a sentence of death.

On 31 December 1985 the California Supreme Court confirmed the guilt trial, but remanded as to penalty.

Petitioner then filed several writs of habeas corpus in superior court, attacking the guilt phase. As each was denied, Petitioner then filed original writs of habeas corpus in the State District Court, then State Supreme Court, with negative results.

After full exhaustion of state review on these various writs, Petitioner and advisory counsel generated a compilation of all state filings and submitted a writ of habeas corpus to the Eastern District Court.

While the federal writ was being prepared, a penalty phase retrial was conducted. On 13 March 1992 Petitioner was again sentenced to death.

II. QUESTIONS RAISED IN THIS APPEAL

A. Is Petitioner precluded from federal review of guilt issues fully exhausted at the state level, while awaiting a second,

unwaivable, automatic appeal in state court of unrelated penalty phase issues arising from partial retrial?

B. Will Petitioner be denied Due Process by have to let the guilt phase issues lay dormant, should this Court rule adversely on the first question.

III. **ARGUMENTS RE: DISTRICT COURT RULING**

A. The District Court erred in concluding that the writ at bar contains exhausted and un-exhausted issues, within the meaning of 28 U.S.C. § 2254 (b)(c); and *Rose v. Lundy*, 455 U.S. 509 (1982)

B. The District Court erred in its presumption that the issues raised in the writ at bar would IN ANY WAY be reviewed by the California Supreme Court on the automatic appeal of Petitioner's latest sentence of death.

C. The issues contained in the writ before the District Court are GUILT issues. The arguments therein do not turn on what

penalty is imposed. They are issues that stand on their own merit irrespective a sentence of death, or a lessor sentence.

D. Petitioner has made a proper showing that review of the guilt issues, both appellate and writ wise, are fully exhausted at the state level, and there are NO other state avenues available for further review of the presented issues.

E. This Court should direct the district court to rule on the merits of the writ in question without delay, as a logical extension of evolving death penalty litigation, and in light of your recent ruling in *Blazak* v. *Ricketts*, 971 F.2d 1408 (9th Cir. 1992).

IV. LEGAL ARGUMENTS

1. DISTRICT COURT'S RULING

A. Introduction

1. The tenor of the District Court's opinion was that the writ of habeas corpus submitted by Petitioner, contained issues not yet reviewed by the California

Supreme Court. The District Court wrote: [F]urthermore, a prisoner in state custody is required to exhaust state judicial remedies by affording the highest state court a fair opportunity to rule on the merits of the claims prior to bringing those claims to the federal courts."

2. The District Court determined that Petitioner has not met the requirements of 28 U.S.C. § 2254 (b)-(c). The United States Supreme Court defined this "total exhaustion" rule in *Rose* v. *Lundy, supra*.

The basis stated for the District Court's decision was: " . . . [although the petitioner alleges his guilt phase claims have been exhausted,] his death sentence has not been imposed or reviewed by the state courts." (Emphasis added.) (See District Court Denial Without Prejudice.)

3. In making the aforementioned determinations, the District Court failed to consider California Supreme Court's

established criteria for review. The California Supreme Court has clearly and repeatedly stated what may, and may NOT, be reviewed on a second automatic appeal when a death sentence is reimposed by a jury and trial court, in a retrial of the penalty phase only.

B. Standards

1. Federal

a. Title 28 USCS §2254 (b), (c) provide that a state prisoner's application for a writ of habeas corpus in a federal district court based on alleged federal constitutional violation will not be granted unless the applicant has exhausted the remedies available in the state courts.

2. State

a. The latest definitive statement of the California's standard for review was spelled out in *People* v. *Deere*, 53 Cal.3d 705; 280 Cal.Rptr. 424, 808 P.2d 1181 [May 1991] at pg. 713: *"Although the*

judgment was reversed as to penalty, it was "affirmed in all other respects." (citing omitted) *THUS, ONLY ERRORS RELATING TO THE PENALTY PHASE RETRIAL MAY BE CONSIDERED IN THIS SUBSEQUENT APPEAL."* (*People* v. *Durbin*, (1966) 64 Cal.2d 474, 477 [50 Cal.Rptr. 657, 413 P.2d 433; *People* v. *Smyers*, (1969) 2 Cal.App.3d 666, 668 [83 Cal.Rptr. 3].) (Emphasis added.)

3. Case

a. "The judgment is affirmed on the guilt phase and finding of special circumstances. The judgment is reversed on the penalty phase and remanded for a new penalty trial." *People* v. *Phillips*, 41 Cal.3d at pg. 84; 232 Cal.Rptr. at pg. 163

C. Review

1. That Petitioner has presented for review the entire contents of the writ of habeas corpus before the District Court, to the highest state court, is indisputable.

2. That the California Supreme Court will NOT grant further review of the issues presented is without question.

3.

3. In its simplest form, the issue of this appeal is not so much of exhaustion, but of first impression. Through all the rhetoric of who - what - when, the real question that must be answered is: From where do the alleged set of operative facts stem?

Petitioner contends a bifurcated death penalty case must be considered ripe for federal review, cause-by-cause, NOT as a single issue.

4. As stated above, Petitioner urges "first impression" as the standard for review of the "cause-by-cause" issue I will promote in my appeal. As a separate but intertwined line within the case, Petitioner also raises Due Process violation as a standard under which the cause-by-cause issue

should be judged.

D. Arguments

The holding of this court in *Blazak* v. *Ricketts, Supra* is not directly at issue here, but some of the Court's analysis is instructive. To reach *Blazak* I am compelled to look back for a moment.

1. The holding in *Rose* v. *Lundy, Supra* and subsequent writing by the U.S. Supreme Court on the subject of "Intertwined Exhausted and Unexhausted Claims," commonly called "total exhaustion" were for the purpose of:

a. Relieving, ". . . the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims." *Lundy, Supra,* at 520.

b. Reduce piecemeal litigation.

c. Promoting comity.

d. Not impairing "prisoner's principal interest . . . in obtaining speedy federal relief on his claims." *Lundy, Supra,* at 520.

2. This Court has traditionally been a key advocate of a "total exhaustion" rule. See *Gonzales* v. *Stone,* 546 F2d 807.

3. 28 U.S.C.§ 2254 (c) states: "An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

In this case, the California Supreme Court has confirmed the conviction. Additionally, the California Supreme Court has had the opportunity to review all the subsequent Petitions for Review, and original writs of habeas corpus, as separate motions. The issues contained in the writ of habeas

corpus before the District Court is a compilation of the state petitions. The issues are guilt issues. They do not turn on what penalty is imposed. They are issues which stand on their own merit irrespective of sentence.

The California standard articulated in *People* v. *Deere, Supra,* validates Petitioner's argument that he has fully exhausted state review.

Petitioner comes full circle to this Court's ruling in *Blazak*. The Court's writing envisioned a very similar scenario: "Even if the district court's grant of the writ is ultimately overturned, all of the conviction challenges will be resolved and leave only the sentencing issues to be considered."

The *Blazak* Court went on to say, " . . . an affirmance on appeal will obviate altogether the need for either the district court or this court to address Blazak's penalty phase claims."

The same applies to the case at bar. If the district court, this Court, or the U.S. Supreme Court grants relief on the writ attacking the guilt phase, the penalty phase issues stemming from a partial retrial, become moot.

Petitioner's second automatic appeal is fairly straight forward. Petitioner WILL allege constitutional violations, including prosecutorial misconduct. This misconduct occurred in the retrial of the penalty phase, but not during the guilt trial. The issues are not intertwined.

This brings the argument to "cause-by-cause." It is the position of Petitioner that the alleged operative facts in a guilt trial held over 12 years ago (1979-80), MUST be deemed a separate entity from the alleged operative facts stemming from a penalty retrial held in 1991-92. Although originating from the same case, the alleged operative facts were from two different proceedings, two

different attorneys, two different judges, and two different juries. Thus, two separate entities.

To accept the District Court's apparent position that the standard should not be what Petitioner refers to as "cause-by-cause" ignores a potential major flaw in that rationale.

What if the California Supreme Court DOES agree with Petitioner's arguments during the penalty phase only, second automatic appeal?

What happens if the California Supreme Court orders another penalty phase retrial, and Petitioner is sentence to death a third time? (This has happened in at least two California cases.)

This very real concern was addressed in *Blazak, supra, fn.* 7 "Moreover, unlike habeas grants exclusively on sentencing issues, the grant of a habeas petition because of the constitutional invalidity of a conviction raises concerns that a possibly innocent

person has been unjustifiably incarcerated on death row for a number of years. Delaying retrial in such cases, while attorneys fight over a sentence that may no longer exist, risks the perpetuation of a monumental injustice, should retrial ultimately result in an acquittal."

A death penalty litigant who has been confirmed as to guilt, but retried once, twice, or even three times as to penalty, must be distinguished from the litigant who has failed to exhaust one or more issues stemming from the same operative facts.

This bifurcated scenario was distinguished in *Burkett* v. *Cunningham*, 826 F.2d 1208 (3rd Cir. 1987). In *Burkett*, petitioner filed two habeas corpus appeals, arising out of three state court convictions from the same county. The appeals were referred to by numbers, with the first being 140/141, the second 161. The Court's opinion, footnote 32 states in relevant part: "We note

also that even were we to find claims concerning 161 unexhausted, relief would not be barred on the 140/141 claims, since they arise from a wholly separate convictions. The "total exhaustion" rule of *Rose* v. *Lundy*, (citings omitted), applies only to claims arising from a single criminal case."

Petitioner acknowledges his claims stem from a single "criminal case," however, I urge that when there has been:

a. A guilt, then penalty trial:

b. A state appeal, followed by two (2) writs of habeas corpus, wherein the guilt phase issues were fully exhausted as to state court review:

c. A second penalty trial some 12 years later, before a different trial court and jury.

the second, controlling penalty phase becomes analogous to a "separate case."

V. CONCLUSION

A. I've run off at the fingers much longer than anticipated, in an attempt to make the following points:

1. My writ of habeas corpus does NOT contain any issues that the highest court in the state of California wasn't afforded full opportunity to review;

2. I did NOT submit the writ of habeas corpus to the district court until such time as all rulings were final at the state level; and

3. *Rose* v. *Lundy, Supra* says Petitioner is ripe for federal review.

B. Petitioner fully realizes "conventional wisdom" of death penalty litigation on the average case says you take every opportunity for delay.

The "average case" doesn't have the Sheriff-Corner of the county at the date of the offense, now stating that Petitioner could NOT have fired the fatal shot.

The "average case" doesn't have critical police reports surfacing for the first time, some 13 years AFTER the first trial.

The "average case" doesn't have a key official of the California Supreme Court making a statement to a member of the bar concerning Petitioner's case, that " . . . in death penalty cases the (California) Supreme Court doesn't even read pro per petitions."

For these reasons, Petitioner has chosen to ignore "conventional wisdom."

QUESTION #3: Why should not Richard Phillips make application in the state court for any materials, computer, investigations, etc. needed in aid of his appeals and habeas corpus review until a petition for habeas corpus is properly before this court?

1. **STATE COURT**

A. Petitioner does not have the same status before the state court as he does in the federal system.

Petitioner had originally intended to proceed *pro se* with advisory counsel in his second automatic appeal of the penalty phase,

in the California Supreme Court. (Current there is NO inmate in the state of California under sentence of death who has been approved by the California Supreme Court to proceed *pro se* with or without advisory counsel, in their automatic appeal.) After seeking input from Mr. McMurray of the California State Attorney General's office (Mr. McMurray is an Assistant Attorney General. Petitioner has been assigned to Mr. McMurray's caseload continuously since 1980), as well as discovering the California Supreme Court's policy, practice, and procedure concerning petitions filed by *pro se* inmates, (See response to Question #2 herein), Petitioner reluctantly decided to seek counsel. (See response to Question #1 herein.)

[FOLLOWING HANDWRITTEN]

NOTE: On or about 1 December 1993, my typewriter was inadvertently damaged by staff. Since that time I have tried to send the unit out for repair.

On or about 15 December 1993, Wendy Peoples, Attorney at Law from the California Appellate Project, attempted to expedite this

repair through contacts to the office of Denise Dall, Legal Affairs Coordinator, San Quentin State Prison. As of this seating, Ms. Dall has not returned Ms. People's call.

On or about 21 December 1993, Petitioner spoke with Correctional Officer Lawson, in the presence of Correctional Officer Gregby. Officer Lawson is the Property Officer for Condemned Row II. During this conversation Petitioner was told that there was no current program to send my typewriter out for repair, and that if I had a deadline from the Court I would have to submit it handwritten.

I apologize in advance for my handwriting. I submit I'm the only death penalty litigant currently before this court who submits handwritten pleadings. This is another reason why the court should not summarily dismiss the Petition for Pro Per Reviews.

2. PETITION BEFORE THIS COURT FOR INVESTIGATOR FEES/FUNDS

A. Since Petitioner files his motion for funds so an investigator could gather documents for review by Mr. Horvath, (advisory counsel for the matter at bar) Mr. Horvath has been appointed by the California Supreme Court to represent Petitioner in his second automatic appeal. As such, Mr. Horvath has been provided all penalty retrial documents.

Therefore Petitioner withdraws his motion for funds for an investigator.

3. **STANDINGS BEFORE THIS COURT**

A. Petitioner currently has standing before this Court; has been granted *pro se* status (with advisory counsel); and therefore his Petition for Pro Per Provisions is both proper and timely.

1. After the district court refused to issue a certificate of probable cause, (CPC) Petitioner filed for a CPC before this Court.

As this Court recently reiterates in *Clark* v. *Lewis*, 1 F.3d 814 (9th Cir. 1993), following the dictates of *Barefoot* v. *Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394, 77 L.Ed.2d 1090 (1983), "This court should grant an application for a certificate of probable cause to appeal only if the petitioner makes a substantial showing. . . . To make this substantial showing, a petitioner must demonstrate that the issues are "debatable among jurists of reason," that a court could resolve the issues differently, or that the issues are "adequate to deserve encouragement to proceed farther."" *Clark* v. *Lewis*, *Id.* at 819.

The sole question of law issue in Petitioner's application for CPC is:

"8. A Certificate of Probable Cause should issue in the case at bar to address the following issues: Is Petitioner precluded from federal review of guilt issues fully exhausted at the state level, while awaiting a second, unwaivable, automatic appeal in state court of penalty phase issues arising from a partial retrial?"

On 18 June 1992 a CPC was issued by this Court, to address the above question.

B. <u>The Catch-22</u>: **LET ME BE CLEAR**: I chose to proceed <u>pro se</u> with advisory counsel, not because I'm some kind of "control freak," or think I'm a legal super star. I am <u>very</u> cognizant of my limitations, as well as such potential pitfalls as "tunnel vision" as it applies to this case.

ON THE ONE HAND: This Court, relying on *Coleman* v. *Thompson*, ___ U.S. ___, ___ ___ ___, 111 S.Ct. 2546, 2566-67, 115 L.Ed.2d 640 (1991) recently held in *Bonin* v. *Vasquez*, 999 F.2d 425 (9th Cir. 1993) that there is no

Sixth Amendment right to counsel in either federal or state postconviction or habeas proceedings.

ON THE OTHER HAND: The consistent tenor of the State is: (In response to inmate appeal for more than 2-1/2 hrs. per week access to the law library; inmate appeal to possess more than 10 books total [including law books]; and inmate appeal to expand hrs. which legal mail may be sent out via post-main-originals available for review upon request) "We are providing the same amount of time/access for all inmates. In your case you . . . have a court appointed attorney, assistant, or advisor."

In Plain English, the field of play is increasingly unilevel! There isn't an attorney's office in the Attorney General building handling the complex issue of death penalty litigation who doesn't have a complete - is restricted to 2-1/2 hrs. per week in the Law Library - may only have 10 books in his office - and sometime access to a photocopier. When the state refuses to even consider the needs of a pro se litigant, this Court should step forward.

ADDITIONAL ISSUE: Petitioner respectfully requests this Court to a moment and outline what advisory counsel will be paid for. In the past I have submitted my work product to Mr. Horvath, i.e. the response to question #2 herein. Mr. Horvath would then edit as necessary, then have copies printed. We have found this to be a functional way to proceed. If this is beyond the scope of this Court's idea of advisory counsel's level of participation, please apprise Mr. Horvath and myself at your earliest convenience.

CONCLUSION: The state court recognizes validity of going forward on litigating guilt phase issues, independent of penalty, by issuing a stay order. The state court of

appeals AND state supreme court had the opportunity to tell me such petitions were premature - not ripe for review, and did NOT do so.

The state courts each had before it two (2) petitions in which to make such a ruling. Had they considered the petitions premature - - - the state's highest court has washed its hands as to guilt, in this case.

This Court should issue order for Pro Per Provisions so that Petitioner and advisory counsel can prepare documents via file sharing, as we have in the past, and allow Petitioner to fully brief this appeal.

DATED: 29 December 1993

/s/
Richard Lewis Arnold Phillips
In Pro Se

ADDENDUM

On 27 December 1993 Petitioner received the State's response to this Court's instant questions. Petitioner respectfully requests this Court to take notice that as to Petitioner's claims of proper legal standing, necessity of equipment to properly appeal on a level field of play; security arguments; and promotion of fiscal economy, were unrefuted by the State.

CERTIFICATE OF SERVICE

Richard Louis Arnold Phillips) Case No. 92-15828

Petitioner

vs.

Daniel B. Vasquez, Warden
San Quentin State Prison,

Respondent.

I, the undersigned, hereby certify that I am a citizen of the United States, that I am over the age of 18 years, and am a party to the within entitled action. My business/residence address is:

P.O. Box C-13707 S-E-71
San Quentin State Prison
San Quentin, CA 94964

I served a copy of the attached:

PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE MOTION TO AMEND - REQUEST FOR PRO PER PROVISIONS

upon the interested parties by placing a true and correct copy thereof in an envelope and sealing same, postpaid and by depositing same for delivery in the United States mail at San Quentin State Prison, concerning inmate delivery to correctional authorities of outgoing mail, addressed as follows:

STATE ATTORNEY GENERAL
P.O. Box 944255
Sacramento, CA 94244-2550

DANIEL B. VASQUEZ, Warden
San Quentin State Prison
San Quentin, CA 94964

I declare under penalty of perjury that

the foregoing is true & correct, and that this was executed on the 29th Day of December 1993, at San Quentin, California

/s/
Richard Louis Arnold Phillips
In Pro Se

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX Q

DANIEL E. LUNGREN
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Telephone: (916) 324-5281
Counsel for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

No. 92-15825

Petitioner and Appellant,

v.

DANIEL B. VASQUEZ, Warden,
San Quentin State Prison,

Respondent and Appellee.

_____/

On Appeal From An Order In
A Habeas Corpus Proceeding
In The United States District Court
For The Eastern District of California
No. CIV-F-92-5167-REC-P

RESPONSE TO ORDER TO SHOW CAUSE

Donald J. Horvath #53777
6592 North First Street
Fresno, California, 93710

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Advisory Counsel for
Appellant Richard Phillips

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

No. 92-15828

Petitioner and Appellant,

v.

DANIEL B. VASQUEZ, Warden, San Quentin State Prison,

Respondent and Appellee.

_____/

RESPONSE TO ORDER TO SHOW CAUSE

Donald J. Horvath, advisory counsel for Richard Phillips, answers the questions stated in this court's Order to Show Cause dated 2 December 1993 as follows:

1. STATUS OF CALIFORNIA COURT PROCEEDINGS

Richard Phillips (petitioner) has pending in California courts only his automatic appeal from the death sentence imposed upon him after his second (1991) penalty trial--California Supreme Court Action No. S025880.

The second penalty trial occurred because of the judgment on appeal from petitioner's

original death sentence. The California Supreme Court affirmed the adjudication of petitioner's guilt and the special circumstance finding, but remanded the cause for a new penalty trial. (*People v. Phillips* (1985) 41 Cal.3d 29, 84, 222 Cal.Rptr. 127.)

On 19 April 1993, the California Supreme Court appointed me in Action No. S025880 to represent petitioner on his automatic appeal from the 1991 death sentence, "including any related habeas proceedings."

By letter of 30 April 1993, I asked an employee of the California Supreme Court, Mr. Robert Reichman, whether my appointment in this case includes habeas corpus proceedings which attack the adjudication of guilt.

On 18 May 1993, Mr. Reichman called me on the telephone and stated the following: My appointment includes guilt habeas corpus petitions. However, petitioner's two previous habeas corDus Dleadinqs filed in the

California Supreme Court[1] had been denied on the merits. Therefore, I would not be paid for doing any habeas corpus issues attacking the guilt adjudication which had been raised in the prior pleadings; I would be paid only for habeas corpus proceedings directed to guilt issues grounded upon new facts not reasonably available to the defense at the time of the prior habeas corpus petitions.

This statement is consistent with the California Supreme Court's subsequent decision barring repetitive habeas corpus petitions absent extraordinary circumstances. (*In re Clark* (1993) 5 Cal.4th 750, 21 Cal.Rptr.2d 509.)

---

[1] Mr. Phillips filed a petition for review from the Court of Appeals' denial of his petitoin for writ of habeas corpus in Action No. F014410. I believe the Supreme Court number for this action is S021131.

Mr. Phillips also filed an original habeas corpus petition in the Supreme Court after the Court of Appeal denied his habeas corpus petition in Action No. F016599. I believe the Supreme Court number for this action is S023004.

The record on appeal has not yet been certified in petitioner's automatic appeal. A trial court motion to correct the record on appeal is due on 12 January 1994. I expect to file the motion by that date.

2. THIS APPEAL SHOULD NOT BE DISMISSED AS PREMATURE.

This court has asked why the appeal should not be dismissed as premature because all proceedings in the state court had not been exhausted as of the time the petition was filed.

There is no legal requirement that all state court proceedings related to punishment be completed before a federal habeas corpus petition attacking a guilt adjudication which is final in state courts may be filedv The only requirement for federal habeas corpus relief is that all available state remedies upon the issues raised in the federal Detition be exhausted. (28 U.S.C. § 2254 subd. (b); *Rose v. Lundy* 455 U.S. 509, 71 L.Ed.2d 379,

102 S.Ct. 1198 (1982).)

In *Rose*, our SuDreme Court held that state prisoners who file federal petitions which raise both issues which have been fully litigated in state court and issues as to which they have not exhausted state remedies are entitled to resubmit their federal petition with only exhausted claims. (455 U.S. at p. 520.) Here, petitioner has raised only exhausted claims in Mis federal petition; he is entitled to proceed in federal court pursuant to this direct holding of the United States Supreme Court.

In *Rose*, our Supreme Court explained the reasons for the rule requiring a state prisoner to exhaust available state remedies before seeking federal habeas corpus relief. The court stated that the exhaustion rule is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." The rule also promotes comity

between state and federal courts by encouraging state prisoners to seek relief first from state courts and thereby giving state courts the first opportunity to review claims of constitutional error. (455 U.S. at p. 518.)

The California courts have had the opportunity to consider all issues raised in petitioner's federal habeas corpus petition and to grant him appropriate habeas corpus relief--the California Supreme Court has considered and denied on the merits every issue raised in petitioner's federal habeas corpus petition.

All issues raised in petitioner's federal habeas corpus petition attack the constitutional validity of the adjudication made in petitioner's 1980 trial that he is guilty of murder with special circumstances. The adjudication of petitioner's guilt of murder with special circumstances is final in the California courts. Petitioner's guilt

adjudication has been affirmed on direct appeal to the California Supreme Court. All collateral constitutional attacks upon the guilt adjudication urged in petitioner's federal habeas corpus petition have been raised in state habeas corpus petitions which were litigated as high as the California Supreme Court and denied on the merits by that court.

It would promote comity between state and federal courts to consider petitioner's federal habeas corpus constitutional attacks upon the guilt adjudication eforexthe California Supreme Court decides penalty issues. The guilt adjudication is final in California courts. If petitioner's constitutional attacks upon the guilt adjudication in federal court have merit, he is entitled to a new guilt trial. No penalty can be imposed absent a constitutional adjudication of guilt. Therefore, a prompt adjudication of guilt issues in federal court

would relieve the California Supreme Court of the burden of deciding moot penalty issues in the pending automatic appeal from the death penalty. Since the California Supreme Court is very busy, it should welcome any federal adjudication which would relieve it of unnecessary work.

A rule of law which requires that the penalty portion of petitioner's case finally be decided by California courts before he can make a federal habeas corpus attack upon the validity of the guilt adjudication long final in California courts would result in needless delay which would severely prejudice petitioner's ability to prove the factual allegations made in his federal habeas corpus petition. The crime was committed in 1977--sixteen years ago. Petitioner's guilt trial, the result of which he attacks upon various constitutional grounds in his federal petition, occurred in 1980--thirteen years ago.

It will take several years for the pending penalty appeal to ogre be decided by the California Supreme Court. If petitioner's present death sentence is reversed on direct appeal, there will be yet another penalty trial and yet another automatic direct appeal. The process of penalty reversal and retrial could continue for a very long time.

Thus, if petitioner must wait for the penalty aspects of his case to be finally determined in state courts before he is allowed to attack the long final California guilt adjudication in federal court, he may be forced to litigate facts which occurred more than twenty years before the federal habeas corpus hearing! Witnesses die. Memories fade. Since petitioner has the burden of proving the constitutional defects in his 1980 guilt trial asserted in his federal petition, (*Burkett v. Cunningham*, 826 F.2d 1208, 1218 (3rd Cir. 1987) he is the party who will be prejudiced by the loss of material evidence when

witnesses die or they no longer can remember what happened[2].

A rule of law which requires that the penalty portion of petitioner's case be finally decided by California courts before he can make a federal attack upon the validity of the guilt adjudication long final in California courts will not result in a more efficient administration of justice in federal habeas corpus proceedings.

Petitioner's guilt trial, which is attacked in his federal petition here at issue, occurred in 1980. Petitioner's second penalty trial, which will be reviewed in his pending state appeal, occurred eleven years later in 1991. Where the issues of guilt and

---

[2] Richard Graybill, who petitioner says was a witness to the crimes, has already died. At petitioner's second penalty trial, the court excluded testimony of Tamera Nichols, then Graybill's live-in girlfriend, which would support a finding that Graybill witnessed the crime. On appeal, I will argue that the exclusion of this evidence was prejudicial error.

penalty are bifurcated and decided in separate trials over a decade apart, there will be no factual or legal issues common to both trials. Therefore, the federal courts will gain nothing by delaying action upon the guilt issues raised in the instant habeas corpus petition until penalty issues are finally decided by California courts.

Appellee ignores the federal statute and United States Supreme Court decision which each clearly state that the only requirement for federal habeas corpus relief is that the issues raised in the federal petition be exhausted in state court. (28 U.S.C. § 2254 subd. (b); *Rose v. Lundy* 455 U.S. 509, 71 L.Ed.2d 379, 102 S.Ct. 1198 (1982).) Appellee suggests that *Hillery v. Summer*, 496 F.Supp. 632, 637 (E.D. Cal. 1980) is determinative of the issue raised by this court. (Appellee's Return to Order to Show Cause, pp. 2-3.)

Appellee is wrong. A district court obviously does not have the power to overrule

both the Congress and the United States Supreme Court regarding the requirements for a state prisoner to seek federal habeas corpus relief. *Hillery* was decided two years before *Rose* and obviously did not deal with the articulation in *Rose* of the relationship between state and federal courts in the area of federal habeas corpus. The issue in *Hillery* was whether a state prisoner may decide to wait until his state criminal case was final as to penalty before seeking federal habeas corpus relief. The issue here is whether a state prisoner who desires speedy federal relief on guilt issues must wait for penalty issues to be decided before seeking federal relief.

3. PETITIONER NEEDS MATERIALS TO PROPERLY PROCEED IN PROPRIA PERSONA WITH THIS APPEAL FROM THE ERRONEOUS DISMISSAL OF HIS HABEAS CORPUS PETITION.

The court has asked why petitioner should not make application to state courts for the computer and other materials he has requested

in this court "until a petition for habeas corpus is properly before this court?"

Petitioner is proceeding in propria persona (with advisory counsel) in this appeal from the dismissal without prejudice of his habeas corpus petition. For the reasons stated in Point 2 above, the appeal has merit--petitioner's federal habeas corpus petition raising only exhausted guilt issues should not have been dismissed by the district court.

In state court, petitioner has appointed counsel to represent him. The California Supreme Court will not give petitioner the materials which he has requested because he is represented by counsel on automatic appeal from his second death sentence.

Assuming arguendo that petitioner otherwise legally is entitled to the materials he seeks. petitioner needs such materials in order to represent himself on this appeal.

As I previously have stated, it would

help petitioner and I to prepare petitioner's briefs on this appeal if he had access to his computer and my past experience with petitioner is such that I do not believe he would abuse the privilege if granted access to a computer.

I request the court's guidance regarding my duties as advisory counsel. In particular, may I write briefs for petitioner?

CONCLUSION

This appeal should not be dismissed as premature.

Since the appeal has merit, the case should be set for hearing in this court as soon as possible so that the erroneous judgment below may be reversed and a serious constitutional issues raised petition may be held without further delay.

DATED: 30 December 1993

/s/

J. Horvath

DECLARATION OF SERVICE BY MAIL

Re: Richard Phillips v. Daniel Vasquez No. No. 92-15828

I, Donald Horvath, declare that I am over 18 years of age, and not a party to the within cause; my business address is 6592 North First Street, Fresno, California 93710. I served a true copy of the attached

RESPONSE TO ORDER TO SHOW CAUSE

on each of the following, by placing same in an envelope addressed respectively as follows:

Daniel E. Lungren, Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
Att: Edmund D. McMurry, Esq.

Mr. Richard Phillips
C-13707 5-E-71
San Quentin Prison
San Quentin, CA 94964

Each envelope was then, on 30 December 1993, sealed and deposited in the United States mail at Fresno, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perJury that the foregoing is true and correct.

Executed on 30 December 1993 at Fresno, California.

Donald J. Horvath

95-616

No. 95 -

Supreme Court, U.S.
FILED
OCT 16 1995

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

APPENDIX 2 TO PETITION FOR WRIT OF CERTIORARI

APPENDICES R-1 - BB

DANIEL E. LUNGREN
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EDMUND D. McMURRAY
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No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

APPENDIX R-1

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
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Counsel for Petitioners

ATTORNEY GENERAL LETTERHEAD

July 29, 1994

United States Court of Appeal
for the Ninth Circuit
Cathy Catterson, Clerk
P.O. Box 193939
San Francisco, CA 94119-3939

RE: Richard Phillips on Habeas Corpus
No. 92-15828

Dear Ms. Catterson:

I am in receipt of a letter to the court from appellant Phillips' advisory counsel, Mr. Donald J. Horvath regarding the issues to be covered at the upcoming oral argument calendared for October 11, 1994. Contrary to the assumptions of Mr. Horvath and appellant Phillips, I am presuming that the oral argument will be limited to the three questions posed in the Order to Show Cause of December 2, 1993, the only issues briefed before this Court in this case. If I am incorrect, please advise me.

In this regard, as to question two, at oral argument I wish to cite the recent decision in *Stanley* v. *California supreme Court*, 21 F.3d 360 (9th Cir. 1994), 94 DAR

667, filed April 12, 1994, amended May 18, 1994, which cites to *Sherwood* v. *Tomkins*, 716 F.2d 632 (9th Cir. 1983).

Sincerely,

DANIEL E. LUNGREN
Attorney General

/s/

EDMUND D. McMURRAY
Supervising Deputy
Attorney General

EDM:gmm

DECLARATION OF SERVICE BY MAIL

Re: Richard Phillips on Habeas Corpus

No. 92-15828

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

LETTER TO CLERK - U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Donald J. Horvath
Attorney at Law
4441 W. Herndon, Ste. 6
Fresno, Ca 93722

Richard Lewis Arnold Phillips
P.O. Box C - 13707
San Quentin State Prison
Tamal, Ca 94964

Daniel Vasquez, Warden
San Quentin State Prison
Tamal, CA 94964

Each said envelope was then, on July 29, 1994, sealed and deposited in the United State mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 29, 1994, at Sacramento, California.

/s/_____
DECLARANT

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

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ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX R-2

DANIEL E. LUNGREN
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Telephone: (916) 324-5281
Counsel for Petitioners

Donald J. Horvath
Attorney at Law
4441 W. Herndon, Ste. 6
Fresno, California 93722

Phone & FAX:
(209) 276-3248 (LETTERHEAD)

28 August 1994

United States Court of Appeal
for the Ninth Circuit
Cathy Catterson, Clerk
P.O. Box 193939
San Francisco, CA 94119-3939

RE: Richard Phillips on habeas corpus; No. 92-15828

Dear Ms. Catterson:

This is a reply to attorney Edmund McMurray's letter of 29 July 1994.

Sherwood v. *Tomkins*, 716 F.2d 632 (9th Cir. 1983) does not compel conclusion that petitioner cannot pursue his federal habeas corpus petition attacking the adjudication that he committed murder with special circumstances until his state appeal from the imposition of the death penalty has been decided.

This court stated the grounds for its *Sherwood* decision as follows:

> "[E]ven if the federal constitutional question raised by the habeas corpus petitioner cannot be resolved in a pending appeal, that appeal may result in the reversal of the petitioner's conviction on some other

ground, thereby mooting
the federal question."
(716 F.2d at p. 634.)

Here, petitioner's appeal from the death penalty cannot result in the reversal of his conviction of murder with special circumstances because all guilt issues have long been final in state courts. Since the rational for the *Sherwood* decision does not exist in this case, *Sherwood* is not determinative of this case.

Stanley v. *California Supreme Court* ___ F.3d ___ (9th Cir. 1994), 94 DAR 6670 is not at all on point. *Stanley* merely cites *Sherwood* for the general proposition that state claims must be exhausted before habeas corpus relief may be sought in federal courts.

The relevant cases are those which have applied the mandate of *Rose* v. *Lundy* 455 U.S. 509 and recognized that absent some compelling reason for delay a state prisoner has an election to pursue his exhausted federal issues on federal habeas corpus whenever the petitioner decides to do so. (*Peoples* v. *Fulcomer* 882 f.2d 828, 832 (3rd Cir. 1989); *Reynolds* v. *Ellingsworth* 843 F.2d 712, 724, fn. 22 (3rd Cir. 1988); *United States* v. *Peters* 780 F.Supp. 1183, 1184 (N.D. Illinois 1991).

Sincerely yours,

/s/
Donald J. Horvath

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX S

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Deputy Attorney General
EDMUND D. McMURRAY
Supervising Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
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Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Counsel for Petitioners

LETTER

RICHARD L.A. PHILLIPS
C-13707 3-E-111
San Quentin State Prison
San Quentin, California
94964

15 February 1995

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
121 Spear Street
San Francisco, CA 94105

Case No: 92-15828

ATTN: CATHY A. CATTERSON, Clerk of the Court
JERELDINE CURTIS, Senior Deputy Clerk
B. FLETCHER, Presiding Justice of the Panel

The purpose of this letter is to request that I be allowed to submit the enclosed as post-hearing briefing.

On 11 October 1994, after participating in oral arguments telephonically, I set a letter to Ms. Curtis regarding the problem of hearing what was being said. This was due to the prison's telephone equipment being half-duplex (cheap) and the court's system being full-duplex (high quality).

The clerk of the aforementioned proceedings made me a copy of the tape of the proceedings, and gave it to advisory counsel, Donald Horvath. Mr. horvath in turn sent it to me via the Legal Affairs Coordinator here at San Quentin. I was finally allowed to review this tape (though not retain it in my possession, as it didn't come from an approved vendor?!!?).

After reviewing these tapes, I realized just how much of the proceedings I did NOT hear. My "supplemental briefing" speaks to the issue of delay which Justice Kleinfeld asked about.

Thank you for considering this request.

Sincerely,

/s/
R. PHILLIPS

cc: Mr. Horvath, Advisory Counsel
Mr. McMurray, Asst. Attorney General
Mr. Calderon, Warden

DEATH PENALTY CASE

RICHARD LOUIS ARNOLD PHILLIPS
Proceeding *pro se*
P.O. Box C-13707
San Quentin, CA 94964

DONALD J. HORVATH, Esq.
Advisory Counsel by
Appointment of the Court
4441 W. Herndon, Suite 6
Fresno, CA 93722

(209) 276-3248

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,	)	Case No. 92-15828
Petitioner,	)	SUPPLEMENTAL BRIEFING TO ORAL ARGUMENTS OF 1 OCTOBER 1994
v.	)	
A. CALDERON, Warden, San Quentin State Prison,	)	
Respondent.	)	

TO: THE HONORABLE JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Petitioner RICHARD LOUIS ARNOLD PHILLIPS respectfully seeks inclusion of the following supplemental briefing to the oral arguments

on 11 October 1994, subsequent to Petitioner's review of the audio tapes of the aforementioned proceedings.

Subject: Delays in this case.

I. BACKGROUND

A. The offense in this case occurred on 7 December 1977. (Approximately 30 days after California reinstated the death penalty.)

B. The case was tried to a jury beginning 22 January 1980.

C. The sentence of death was pronounced on 20 February 1980.

D. The California Supreme Court reversed as to penalty on 31 December 1985; and affirmed the convictions upon the guilt phase and finding of special circumstances.

E. After filing several writs of habeas corpus with the trial court, then exhausting fully through the California Judicial system, on 14 March 1992, Petitioner was again sentenced to death.

II. THE ATTORNEYS

A. Paul Martin (now Presiding Judge, Madera County), by appointment of the court, conducted the first trial.

B. Frank Berry and Paul Myers III, by appointment of the California Supreme Court, represented Petitioner on automatic appeal.

C. In Mid-1986, Thomas Mills was appointed to represent Petitioner on retrial as to penalty.

D. John Barker was appointed by the court, upon petition of Thomas Mills for second counsel.

E. E. Marshall Hodgkins III replaced Mr. Barker, when Mr. Barker petitioned the court to be removed from the case.

F. Katherine Hart became second counsel, with Marshall Hodgkins becoming lead counsel, after it was discovered that Mr. Mills was related to Petitioner's co-defendant.

G. In mid-1989 Petitioner filed to

proceed *pro per*, as second counsel, with Katherine Hart as lead counsel.

III. THE JUDGES

This would take too long to detail. Suffice to say that between 1986 and 1992 there were in excess of 12 judges involved in the case.

All judges in Madera County disqualified themselves due to Paul Martin being their PJ.

Numerous judges were brought in from adjoining Fresno County to conduct various pre-trial hearings. All eventually disqualified themselves.

Finally, the California Judicial Counsel stepped in and appointed Bert Bailey. Judge Bailey issued an Order to Show Cause on Petitioner's first writ of habeas corpus. Judge Bailey committed suicide before an evidentiary hearing could be conducted.

After several starts and stops, the California Judicial Counsel again intervened, appointing retired Judge (Lake County) W.J.

Harpham. Judge Harpham conducted evidentiary hearing, per Judge Bailey's order, then denied this writ; granted Petitioner *Pro per* status, ruling that this was NOT for purposes of delay; denied Petitioner's second writ; conducted penalty phase retrial; and imposed sentence of death.

IV. DISCUSSION

Prior to filing of automatic appeal, Attorneys Berry and Myers visited Madera. They met with the prosecutor, trial attorney, court, and sheriff's investigators. At each meeting they were given exhibits, papers, photos, tapes, etc. They did not tag each item as it was given to them.

A. THE FIRST WRIT

After filing Petitioner's automatic appeal, conducting oral arguments, and receiving a decision, attorneys Berry and Myers gathered up all items they had been given, pertaining to the case. Their intent was to label them for storage. While

conducting this inventory, they discovered a cassette tape that neither had previously reviewed. Listening to the tape, attorneys Berry and Myers realized the information therein was obviously exculpatory. Berry and Myers immediately scheduled an attorney/client visit at San Quentin, and played the tape for Petitioner. (See declaration of Paul Myers III before 5th Circuit Court.)

In 1986, upon appointment of Thomas Mills as counsel for Petitioner's penalty phase retrial, Mr. Mills came to San Quentin to meet with Petitioner. At that time petitioner apprised Mr. Mills of the existence of a tape which Petitioner had never heard until such time as attorneys Berry and Myers had played it for him.

Attorney Mills brought in Ed Mulvihill, a licensed investigator. (Before becoming a private investigator, Mr. Mulvihill had been an investigator for the Madera County

District Attorney's Office.)

Mr. Mulvihill was assigned the task of gathering all police files and relevant documents, etc. Upon arrival at the Madera County courthouse/district attorney's office, Mulvihill asked to see the files pertaining to Petitioner. He was told everybody was on vacation, but the items in question were "in a Rice Krispies case in the back closet." mr. Mulvihill was given free access to the room and copying machine. He copied everything he could find pertaining to the case at bar.

Investigator Mulvihill then contacted original trial counsel Paul Martin (now a judge), and made arrangements to retrieve Martin's files on Petitioner's case.

Setting the police reports and relevant documents covered under orders for discovery during the previous trial, on the "kitchen table," Mulvihill couldn't understand why the stack he had photocopied was so much thicker

than the ones which Paul Martin had given him. Upon detailed comparison, Mulvihill discovered he had 324 additional pages from the district attorney's files, which were not in the files of Judge Martin. (See testimony of Investigator Mulvihill on January 4 & 5, 1990.) Included in these papers were the transcript of the tape Petitioner nor Martin had ever heard prior to original trial.

When Petitioner filed to proceed as second counsel, Judge Harpham stated in relevant part:

> "The Court would further find as a result of this hearing, after having read the cited references, this is NOT a request in order to attempt to delay or prevent the orderly processes of the Court and in view of the comments, the Court does find also., I really believe the defendant has been acting as co-counsel for some years." (Emphasis added.)

At the hearing wherein Judge Harpham granted Petitioner pro per co-counsel status, Petitioner informed the Court he would be filing a second writ of habeas, just as soon

as he could prepare the documents. Again, the Court was aware of Petitioner's agenda, and did NOT find it was for purposes of delay.

B. THE SECOND WRIT

During a subsequent discovery hearing, the Madera County District Attorney falsely stated to the trial court that it had no idea what happened to the victim's vehicle. (The vehicle was the ENTIRE crime scene.)

Petitioner's efforts as co-counsel, from his jail cell, uncovered the fact that the prosecution:

1. Caused the vehicle to be towed to the California Department of Justice crime lab;

2. Caused the vehicle to be destroyed without notifying Petitioner or his counsel.

And of course the reports from the tow truck operator, the Department of Justice, and indeed even the Madera County Sheriff himself, were never given to the defense, are no where to be found!

Petitioner made a *prima facie* showing that he could in fact meet the stringent guidelines of *Youngblood*, but was denied an evidentiary hearing.

C. THE RETRIAL

Even after the penalty phase retrial, the trial court saw a need to grant additional time for filing a Motion for New Trial. This extension was for the purpose of locating the former police officer who would testify the prosecutor knowingly introduced false evidence; and also because the prosecutor attempted to mislead court appointed counsel for a defense witness.

D. THE SECOND AUTOMATIC APPEAL

Advisory Counsel Horvath now represents Petitioner before the California Supreme Court on automatic appeal.

Both Advisory Counsel Horvath and Mr. McMurray for the state, referred to the numerous errors in the penalty phase retrial transcripts. This despite precautionary

steps of Petitioner in the form of successfully petitioning the trial court to tape record the entire proceedings.

During 11 October 1994 oral arguments Mr. Horvath represented to this Court he is encountering total disarray when proceeding to the Madera courthouse to review the record. Information is stuffed into (unmarked) manila envelopes, etc.

What both parties failed to mention was the segment of record which reads: "Transcripts unavailable for this hearing. Court reporter lost her notes."

IT SHOULD BE NOTED most inmates sentenced to death in California wait for appointment of appellate counsel for an average of 4+ years. Had I not affirmatively sought counsel, the second automatic appeal wound not have yet begun.

V. CONCLUSION

If this paints a picture of documents thrown into a Rice Krispies box, stuffed into

a back closet - of missing evidence and police reports - of police reports stamped that they were NOT given to the defense by the prosecution, but supposedly by the sheriff's office - of missing reporter's notes - of disappearing lab tests - then you're starting to see the root of the ongoing delays in this case. (And I didn't even go into the California Supreme Court STILL being unable to account for the original exhibits from the first automatic appeal.)

The trial court found that the delays in this case were NOT the result of efforts by the defense to drag it's feet.

This case will become MORE, not less, convoluted with the passage of time.

DATE: 15 February 1995

/s/_____
RICHARD L.A. PHILLIPS
pro se with advisory counsel

VERIFICATION

I am the petitioner in this action. All facts alleged in the above document, not otherwise supported by citations to the record, exhibits, or other documents, are true of my own personal knowledge.

All documents referred to are available for review upon request.

I declare under the penalty of perjury that the above is true and correct and that this declaration was executed on 15 February 1995 at Death Row II, San Quentin State Prison, San Quentin, California.

DATED: 15 February 1995

/s/_____
RICHARD L.A. PHILLIPS
pro se with advisory counsel

CERTIFICATE OF SERVICE

RICHARD L.A. PHILLIPS,	)	Case No. 92-15828
Petitioner,	)	
vs.	)	
ARTHUR CALDERON, Warden	)	
Defendant.	)	

I, the undersigned, hereby certify that I am a citizen of the United States, that I am over the age of 18 years, and am a party to the within entitled action. My business/residence address is:

C-13707 3-E-111
San Quentin State Prison
San Quentin, CA 94964

I served a copy of the attached:

REQUEST TO SUBMIT POST-HEARING BRIEFING

upon the interested parties by placing a true and correct copy thyerof in an envelope and sealing same, postpaid and by depositing same for delivery in the United Staes mail at San Quentin, California, per the restrictions of San Quentin State Prison, concerning inmate delivery to correctional authorities of

outgoing legal mail, addressed as follows:

STATE ATTORNEY GENERAL
P.O. Box 944255
Sacramento, CA 94244

A. CALDERON, Warden
San Quentin State Prison
San Quentin, CA 94964

I declare under penalty of perjury that the foregoing is true and correct; and that this was executed on the 16th day of February 1995 in San Quentin, California.

/s/_____
RICHARD L.A. PHILLIPS
pro se with advisory counsel

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX T

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Deputy Attorney General
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Counsel of Record
1300 I St., Suite 125
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Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Counsel for Petitioners

LETTER

Donald J. Horvath
Attorney at Law
4441 W. Herndon, Ste. 6
Fresno, California 93722

Phone & FAX: (209) 276-3248

4 April 1995

Ninth Circuit Court of Appeals
P.O. ox 193939
San Francisco, CA 94119-3939
Att: Donald Lewis

RE: Richard Phillips on habeas corpus; 92-15828

Dear Mr. Lewis:

Pursuant to your telephone request, I am enclosing docket sheets from the Madera County Superior Court for petitioner's murder trial and the Fifth District Court of Appeal for the two habeas corpus petitions filed in that court--case numbers F014410 and F016509.

Please note that the Fifth District docket in action no. F014410 indicates the dates of action by the California Supreme Court upon the petition for review filed in that court. When considered with the factual pleadings in the habeas corpus petition under review. (see, Federal Habeas Corpus Petition, p. 9) this information may satisfy the court's need for additional information.

Petitioner filed an original habeas corpus petition in the California Supreme Court raising the same issues presented in action no. F016599 rather than a petition for review of the Fifth District denial of relief in that action. (See, Federal Habeas Corpus Petition, p. 12.) Therefore, the Fifth District docket for that case does not show anything regarding the original petition filed in the Supreme Court.

Please return a conformed copy of this letter so I will know you received it.

Thank you.

Sincerely yours,

/s/

DONALD J. HORVATH

cc: Richard Phillips
Attorney General, without enclosures

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

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PETITION FOR WRIT OF CERTIORARI

APPENDIX U

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LETTERHEAD

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4441 W. Herndon, Ste. 6
Fresno, California 93722

Phone & FAX:
(209) 276-3248

(FILED Madera County 95 Mar. 31 pm 3:00,
Rebecca Martinez, County Clerk Deputy

29 March 1995

Ms. Rebecca Martinez
Madera County Clerk
Government Center Building
209 W. Yosemite
Madera, CA 93637

RE: People v. Richard Phillips;
Superior Court No. 4852

Dear Ms. Martinez:

I have been appointed to represent Mr. Phillips upon his appeal for the death penalty imposed in this case. I am also appointed as advisory counsel for Mr. Phillips in federal court.

The Ninth Circuit Court of Appeals has requested me to supply the court with a docket of the trial court proceedings in this case--a chronological listing of documents and orders filed in the trial court. I believe you call this document a register of actions.

Please send me a copy of the entire register of action (docket) for this case

showing all document a register of actions.

Please send me a copy of the entire register of action (docket) for this case showing all documents filed from start to finish.

I have enclosed an envelope for this purpose.

Thank you.

Sincerely, yours,

/s/

Donald J. Horvath

No. 4852
THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiffs

vs.

Richard Louis Arnold Phillips
Defendant
(Cont. from Vol. 12 page 486)

Date 1986	PROCEEDINGS
2-24-86	Clerk's Notice - Hearing set on Remittitur 3-7-86 at 8:15 a.m.
3-3-86	Order Authorization Temporary Removal of Prisoner
3-7-86	MO - Mr. Mills appt as counsel for deft. Deft waives time. Trial setting to be set for 2 hours
3-7-86	MO - 2 hr hearing on trial setting is set for 4-11-86 at 1:30 p.m. before an outside judge
3-7-86	Letter from defendant
3-7-86	Request to conduct media coverage and order
3-14-86	Petition and order sealed by order od court
4-8-86	Order authorization, temporary removal of prisoner 4-11-86
4-11-86	MO - Court sets 2 week jury trial - 10-27-86 at 9:30 a.m. Trial confirmation 10-10-86 at 1:30p.m. - Custody
4-11-86	Request to conduct film and electronic media coverage and order
5-27-86	Packet of in camera matter - taken Mat 23, 1986 by court

	reporter Faust from Fresno County
7-15-86	Motion for discovery 7-30-86 at 8:00 a.m. (no fee)
7-15-86	Points and authorities in support of motion for discovery
7-15-86	Declaration in support of motion for discovery
7-18-86	In camera motions and M.o. (confidential)
7-30-86	MO - Matter cont to 7-31-86 at 9:00 a.m.
7-31-86	Mo - Motion granted as requested as modified above
8-18-86	Order per pc 987(d)
8-18-86	Order for discovery
9-12-86	Notice of motion for continuance (9-22-86 at 8:00 a.m.)
9-18-86	Order authorizing temporary removal of prisoner
9-22-86	MO - Motion to cont. is granted - Cont. to 3-30-87 at 9:30 a.m. (estimated time of 2 weeks) - Custody
11-22-86	Order of the court - Ordered sealed by the court (confidential)
1-22-87	Motion to compel discovery or, in the alternative, to dismiss case or, in the alternative, to Cont. trial date 1-27-87 at 8:15a.m.
1-27-87	MO - Cont. to 2-28-87 at 8:00a.m.
2-18-87	Stipulation hearing set for 2-20-87 continued to 2-23-87
2-19-87	Order for temporary removal of prisoner

(Cont. to pg 167)

(Cont. from page 155)

Date 1987	PROCEEDINGS
2-23-87	MO - Court grants continuance and vacates trial date assigned (3-30-87) Court sets matter for jury on 5-18-87 at 9:30a.m. (time estimated 3 weeks) trial confirmation set for 5-4-87 at 8:00a.m.
4-9-87	Notice of motion to withdraw as attorney of record
4-10-87	Declaration of counsel in support of motions
4-10-87	Notice of motion and motion to exclude nonstatutory aggravating evidence. - Apr. 30, 1987 at 8:00a.m., Dept. 1
4-10-87	Notice of ancillary motion in regards to writ of Habeas Corpus, - Apr. 30,1987 at 8:00a.m.
4-10-87	Notice of motion to suppress evidence - Apr. 30, 1987 at 8:00a.m. Dept. 1
4-10-87	Notice of motion to sequester jury, in limine, that the public be security searched, that all witnesses be excluded, for a daily transcript and interrogatories on a commission. Apr. 30,1987 at 8:00a.m. Dept. 1
4-10-87	Notice of Motion to exclude evidence, Apr. 30, at 8:00a.m. Dept. 1
4-10-87	Notice of motion and motion to strike the death penalty as disproportionate and points and authorities in support there of - Apr. 30,1987 at 8:00a.m., Dept. 1

4-14-87	MO - Court orders Def. to returned for Marsden Hearing on 4-22-87 at 8:00a.m.
4-16-87	Order for temporary removal of prisoner
4-22-87	MO - Court grants Barkies motion to be relined - Trial date vacated - Def waives time for trial - Matter cont. to 4-23-87 for appointment of counsel- Custody
4-23-87	Order granting attorney's motion to withdraw
4-23-87	MO - Per agreement of counsel, 3-4 week jury trial on 9-14-87 at 9:00a.m. - Trial confirmation on 8-31-87 at 8:30a.m. - 1 day hearing and 8-7-87 at 8:30 - 1 day hearing- Marshall Hodgkins is appointed as counsel for Def. -Custody
5-27-87	Order appointing second counsel pursuant to section 987(d) p.c.
6-12-87	Clerk's notice - Motion for reconsideration of trial date scheduled for hearing on 7-1-87 at 8:00a.m. of courts own motion

(Cont. to pg 168)

(Cont. from 167)

Date 1987	PROCEEDINGS
6-30-87	Letter from Def. dated 6-23-87
7-1-87	MO - (Trial date assigned vacated and T.C. on 8-31-87) orders this matter cont. to 8-7-87 at 8:00a.m. motions and trial setting (7-24-87 motions are vacated)
7-30-87	Letter from Def. dated 6-23-87
7-17-87	Motion of evidence to be introduced in aggravation of Penalty trial (§1903 p.c. as of 12-7-77)
7-17-87	Points and authorities in opposition to motions 1) to suppress evidence of letters and telephone communications 2) to exclude evidence of vehicle 3) to exclude "non-statuary aggravating evidence" 4) to strike Death Penalty 5) to exclude photographs of victims and to prohibit witnesses from discussing case 8-7-87 at 8:30a.m.
7-24-87	Transportation order
7-24-87	Transportation order
8-7-87	MO - matter set for trial on 2-22-87 (2 wks 9:00a.m. Trial confirmation set for 2-08-87 at 8:00a.m. hearing on) Motions set for 11-13-87 and 12-4-87 at 8:00a.m. for 1 day hearings Attorney is allowed to respond by 10-1-87 - Ruling to be on first motion date of 11-13-87 - Custody
11-13-87	MO - Court cont. to 12-4-87 at 8:30a.m. and for further hearing on any motion on 1-15-88 at 8:30a.m. for a 1 day

	hearing - Custody
11-20-87	Transportation Order
11-20-87	Transportation Order
12-4-87	MO - Motion to exclude writs is granted - Court denies regrant to exclude photos - Reg #8 granted - #10 granted - ct. denies any further hearing for motions to suppress. Next hearing is 1-15-88 at 8:30a.m.
12-21-87	response to notice of ancillary motion
12-28-87	Transportation Order
1-14-88	Request to conduct film and electric media coverage and order
1-15-88	Mo - Motion to Cont. trial - Jury trial set for 5-16-88 at 9:00a.m. Trial confirmation set for 5-2-88 at 8:00a.m. (4 wk trial) (primisance date is vacated - Custody (Court order transcript of today's hearing (within 30 days))
1-25-88	Ruling Re. Ancillary motion to writ of habeas Corpus
1-27-88	Motion (court report prepared)

(Cont. to 169)

(Cont. from 168)

Date	PROCEEDINGS
4-8-88	Petition for writ of Habeas Corpus (no hearing date set)
4-8-88	Declaration of Richard Louis Arnold Phillips
4-8-88	Memorandum of points and authorities in support of petition for writ of Habeas corpus
4-18-88	Notice of motion and motion for continuance pursuant to penal code section 1050
4-18-88	Declaration of G. Marshall Hodgkins
4-18-88	Transportation Order
5-22-88	MO - Ct. sets matter for trial by jury 11-14-88. Trial confirmation is set for 10-31-88 at 8:00a.m. Response to be filed by 5-20-88 Denial by 6-17-88 hearing 7-1-88 at 8:30a.m.
5-25-88	Letter from Richard Phillips dated 4-14-88
5-26-88	Order of the Ct.
5-18-88	Declaration of Paul R. Martin
5-18-88	Return to order to show cause RE. Habeas Corpus
5-18-88	Points and authorities in opposition to petition for writ of Habeas Corpus
6-14-88	Order denying review after judgement by the Court of Appeal
6-17-88	Response to opposition to petition for writ of Habeas Corpus hearing 7-1-88 at 8:30
6-29-88	Letter from Judge Moffat
7-1-88	MO - Court will disqualify self on Habeas Corpus issue - Outside Judge to hear - Matter

	continued to 8-19-88 at 8:30a.m.
7-25-88	Letter to Judge Edward Moffat - dated 7-1-88
8-19-88	MO - (Petition fort writ of Habeas Corpus) Matter continued to 9-15-88 8:30a.m.
8-19-88	order for temporary removal of prisoner
9-15-88	MO - Ct relieves Mr. Mills and appoints Mr. Hodgkins as primary counsel and Miss. Hart as secondary counsel
9-28-88	Order appointing second counsel pursuant to section 987 (d)p.c.
9-28-88	Transportation order: To D.O.C. Co. of Madera
9-28-88	Transportation Order. To : The Warden of San Quentin State Prison, State of California

(Cont to 170)

(Cont. from 169)

Date 1988	PROCEEDINGS
11-18-88	Petition for writ of Habeas Corpus
11-18-88	MO - Counsel for Def. to file points and authorities on or before 12-2-88, D.A. to respond by 12-16-88 - Matter to be taken under submission by court. - Counsel for Def. req. permission to file another writ w/the court and serve the D.A. with writ in open court. Counsel for Def. req. to withdraw confidential writ personally filed by Mr. Mills - Court grants request - Priant trial date of 3-13-89 is vacated - Trial is re-set for 3-20-89 at 9:00a.m. due to change in assignment of judge. Custody
12-2-88	Supplement points and authorities in support of Petition for writ of Habeas Corpus
1-6-89	Ruling
1-6-89	Ruling on Petition for Writ of Habeas Corpus
1-31-89	Request for Judicial Notice
1-31-89	Points and authorities in opposition to petition for writ of Habeas Corpus filed 11-8-88
1-31-89	Return to order to show cause Re Habeas Corpus issued 1-6-89
1-31-89	Declaration of David D. Minier
1-31-89	Proof of Service by mail
2-17-89	Transportation Order: Hearing: 2/21/89 @ 8:00a.m.
2-17-89	Transportation Order: Hearing: 2/21/89/ @ 8:00a.m.

2-21-89	Declaration in Support of Motion to cont.
2-21-89	MO-Counsel for def., E. Marshall Hodgkins III, States the def. will waive time for trial to 7-10-89 @ 9:00 A.M., on that date a trial setting hearing will be scheduled, the trial will be set up to 90 days from the date of the trial setting hearing. Matter is set for Trial Setting 7-16-89 @ 9:00 A.M., Trial date prev. set for 3-13-89 is vacated, Mr. Hodgkins to prepare the order. To have telephone contact w/the D.A. as to form + contact, then to submit to court for signature Custody (State Prison)
2-27-89	Order of the Court
3-01-89	Traverse Pursuant to Rule 260 of the California Rules of Court on Petitioner's Petition for writ of Habeas Corpus Previously filed on 11-18-89
5-10-89	Stipulation of the Parties Regarding Release of Exhibit
6-23-89	Transportation Order

(Cont. to Pg. 171)

(Cont. from pg. 170)

DATE 1989	PROCEEDINGS
July 12,'89	Order RE Petition for Habeas Corpus. (Writ of Habeas Corpus is granted.)
July 13,'89	Transportation Order, to be transported from San Quentin to Madera D.O.C. for hearing set for 7-17-89 @ 8:00 A.M.
July 17,'89	Mo- Mr. Hodgkins is relieved from appointment as lead counsel & is allowed to withdraw. Kathy Hart is appointed as bad counsel- Next Court Dates: Hrg. on Writ of Habeas Corpus on 10-4-89 @ 9:00a.m. to conclude 10-5-89- Status Conf./Trial Setting on 10-13-89 @ 9:00a.m. (Court orders: Def. not to be returned to San Quentin between 10-4-89 hrg. date & 10-13-89 hrg. date- (Custody- San Quentin)
July 17,'89	Order - Judith S. Sachar be appointed as Legal Runner for Def.
July 17,'89	Order - Any duly recognized atty. or investigator shall be allowed to have interviews w/Def. W/out monitoring, taping, etc.
July 26,'89	Hearing Re Trial Setting; Hearing Re Marsden Motion
July 27,'89	Sealed By Order of court -1. Petition for In-camera Hearing 2 Motion 3. Minute Order
Aug. 10,'89	Petition for In-Camera Hearing
Aug. 28,'89	Mo- Court sets matter For Review on 10-13-89 @ 8:00a.m.
Aug. 28,'89	Order
Aug. 28,'89	Transportation Order

Sept. 5,'89	Mo - Per telephone call this date from judge Harpham. The above motion is set for hrg. on 10-13-89 @ 8:00a.m.
Sept. 7,'89	Declaration in support of Madera Housing (Marked Exhibit "B" (1.1))
Sept. 7,'89	Declaration in Support of Appointment of Court Master
Sept. 11,'89	Proof of Service by Mail
9-18-89	Order
9-18-89	Proof of Service by Mail
9-21-89	Opposition to Defendant's Motion for Appointment of Court Master & Points & Authorities in Support 10-13-89 @ 9:a.m.
9-8-'89	Petition for Temporary stay of Order & Reconsideration for Modification or Revolution of Order & Points & Authorities in Support.

(Cont. to pg. 172)

(Cont. from 171)

DATE, 1989	PROCEEDINGS
10-3-89	Transportation Order (from San Quentin to Madera)
10-3-89	Transportation Order (from Madera to San Quentin)
10-3-89	Motion for Discovery 10-13-89 @ 8:a.m.
10-10-89	Transportation Order
10-30-89	Transportation Order (certified copy) (Judge only signed one original)
10-30-89	Transportation Order (certified copy) (Judge only signed one original)
10-30-89	Order Granting Propria Persona Privileges
11-30-89	Ex-Parte Request for Preparation of transcripts
12-5-89	Motion for Story of Proceedings
12-8-89	Temporary Order Pending Petition for Reconsideration
12-22-89	MO- Kuhn files motion for reconsideration- motion for preparation of transcripts is granted- motion to continue Jan. 4-5 hearing is denied - Hearing on Jan. 4th scheduled for 8:a.m.
12-22-89	Motion for Stay of Proceedings
12-22-89	Declaration in Support of Ex-Parte "Confidential filing"
12-22-89	EX PARTE Petition for Temporary Order Pending Petition for Reconsideration
12-22-89	Petition for Reconsideration/Request for Modification of Order granting Propria Persona Privileges.
12-22-89	Motion to continue Habeas Hearing for January 4th 1990

12-22-89	Notice of Motion & Motion for Reconsideration
12-22-89	Declaration of Sgt. Robert Blaze/ Declaration in Support of Motion for Reconsideration.
12-22-89	Declaration of Madera County, Dept. of Corrections Director AL HAHN in Support of Motion for Reconsideration
12-22-89	Office Memo from Harvey Clausen, Board of Corrections RE: Dayroom Furnishings.
1-4-90	MO. Order providing telephone is approved & signed by court. Motions for additional lights Reading lamps is granted to be included in proposed amended order - Motion for possession of Portable recording device is granted to be included in proposed amended Order - Def. files an addendum to Exhibit E previously filed w/Court an 12-22-89 - Granted- to be placed addendum to Exhibits E with Exhibits E.
1-4-90	Motion to Reconsider
1-4-90	Order Providing Telephone

(Cont. to pg. 173)

(Cont. from page 172)

Date 1990	PROCEEDING
1-4-90	Letter from Def. to Judge W.J. Harphem
1-4-90	Decl. in support of Motion for Reading lamps
1-4-90	Notice of Motion and Motion for additional lights (Reading lamps): Declaration
1-4-90	Declaration in support of motion for portable recording device
1-4-90	Notice of motion and motion for possession of portable recording device: Declaration
1-4-90	Notice of motion and motion to recall all proceedings
1-4-90	Letter to attorney Katherine Hart from Def. dated 12-30-89
1-5-90	Mo - Nature of hrg. evidentiary hearing on writ of habeas corpus 2nd day matter is taken under submission by the court - Case is set for trial Setting on 3-23-90 at 9:a.m. - Court orders Def. to be dressed out for further court hrgs. - County counsel to understand that until the over-all order is completed and signed - the orders are to be completed w/forthworth even though not in written form.
1-16-90	Status conference and trial setting - Motion for discovery - Motion for reconsideration on hearing - Reporter's transcripts
1-19-90	Proceedings on writ of Habeas Corpus - Second day of hearing - Reporter's transcript

2-6-90	Writ of Habeas Corpus- Reporter's transcript
2-14-90	Order denying Writ of Habeas Corpus
3-2-90	Amended order grant in Propria Persona Privileges
3-23-90	MO- Trial Setting: Jury Trial 9-4-90 @ 9:a.m. - (6wks) Def. waives time
8-1-90	Order for documents
8-2-90	Stipulation (step between the parties as follows: 1. Item 68 of the amended order granting Pro-Poria Persona Privileges filed 3-2-90 is amended to allow Def. Phillips to be afforded exercise with inmate Benny Galiegos- Both Defs. are allowed to utilize the dayroom at the same time.)
8-8-90	Order to D.M.V. (signed by Judge N.J. Harpham
7-13-90	Ex-Porte request for Preparation of transcripts & documents for Pre-Trial writ petition
8-14-90	Mo- Orders not to disallow retroactive application of Proposition 115- granted- Ct. directs all parties next w/ the court in cambers on 9-4-90 @ 8:a.m. for pretrial conference- (A court reporter will be required at this conference.)

(Cont. to pg. 174)

(Cont. from page 173)

DATE, 1990	PROCEEDINGS
Aug. 17, '90	Order from the Court of Appeal dated 8-16-90: Petitioner is granted lean to file a reply provided it is received by this Court on or before 9-10-90 - Good cause appearing, the penalty trail set for 9-4-90 is stayed pending determination of this petition
10-9-90	Ex-Parte Petition for In-Camera Hearing for Request of Supplemental 987.9 funds
10-9-90	Points & Authorities in support of Petition for In-Camera Hearing
11-19-90	Notice of Motion & Motion to Exercise Peremptory Challenge (ccp § 170.6) (Re: Judge John DeGroot)
12-21-90	Ex-Parte petition for In-Camera Hearing for request of Supplemental 987.9 funds
12-21-90	Points and Authorities in support of Petition for In-Camera hearing.
12-21-90	Order- for camera hrg.: set for 1/4/91 @ 8:30a.m.
1-2-91	Objection/ Statement of Disqualification
1-8-91	Consent.
1-4-91	Mo. In-Camera Hearing: 170.3 motion granted - 987 request will be re-set
2-7-91	Order
5-16-91	Order from Ct. of Appeal
6-17-91	Order from Ct. of Appeal (signed 12-13-90)
6-17-91	Order from Ct. of Appeal (signed 12-28-90)
6-17-91	Order from Ct. of Appeal

	(signed 5-9-91)
6-21-91	Mo.- Jury Trial- 9/16/91 @ 9:30a.m. Hrg. on motions: 8/16/91 @ 1:30p.m. and disc. of trial procedures
6-21-91	Order for medical treatment (Dental)
6-24-91	Letter from Richard L. A. Phillips, dated June 20, 1991.
7-29-91	Notice of motion for reconsideration of ruling Re. Jury selection and motion to remove defendant as to counsel 8-2-91 at 3:00 p.m.
7-29-91	Points and authorities in support of 1.) Motion for reconsideration of ruling Re. Jury selection and 2.) Motion to remove Def. as Co.- Counsel
8-2-91	Motion to discus the District Attorney under Penal code 1428 Aug.16,1991 at 1:30p.m.
8-2-91	Declaration in support od petition for medical treatment
8-2-91	Order for medical treatment (cardiologist)

(Con't page 175)

(Cont. from page 174)

Date 1991	PROCEEDINGS
8-2-91	MO- Hrg. on reconsideration of ruling Re Jury selection and motion to remove Def. as Co - Counsel - Trial set for 9-23-91
8-13-91	Declaration of David D. Mimier in opposition to motion to recuse (8-16-91 at 1:30p.m.)
8-14-91	Motion- Reporters transcript
8-14-91	Attorney General's opposition to motion to recuse Madera County District Attorney's Office. Aug. 16, 1991 at 1:30p.m. - Judge Harpham
8-16-91	MO - Hrg. on mtn. to Recuse Madera County's D.a> ofc. and opposition thereto. Mtn. to recuse is denied
8-16-91	Notice of evidence to be introduced. (Sec. 190.3 P.C.)
8-16-91	Petition for writ of Habeas Corpus.
8-26-91	Motions - Reporter's transcript
8-29-91	Notice of motion for discovery, and points and authorities 9-23-91 at 9:a.m.
9-3-91	Ruling on Writ of Habeas Corpus filed 8-16-90
9-12-91	Declaration in support of petition for additional legal interviewer time/possession of laptop computer.
9-12-91	Order for additional time for legal interviews/authorization to posses laptop computer for trial
9-17-91	Letter to Judge Harpham, dated Sept. 19, 1991 - from County Counsel

9-19-91	Court of appeals: Fifth Appellate District : The petition for writ of habeas corpus is denied
10-1-91	Stipulation and Order
10-1-91	Order
10-2-91	MO - Hovey Voir Dire
10-3-91	Order for haircut
10-10-91	Letter dated Oct. 9, 1991 from County Counsel -
10-16-91	Motion in Limine/ and points and authorities Re. cross examination of Sharon Coleman
10-16-91	Points and authorities Re. admissibility of admission
10-23-91	Order for transcripts
10-23-91	Order compelling attendance of material witness
10-23-91	Order compelling attendance of material witness
10-23-91	Order compelling attendance of material witness
10-23-91	Clerk's notice: Transcripts of civil case No. 42284 shall be prepared as ordered by the court

(document received from chambers, out of order see pages 176 and 177)
(Con't on pg 176)

(Cont. from pg. 175)

Date 1991	PROCEEDINGS
11-6-91	Request for jury instructions. (Penalty phase)
11-6-91	Proposed jury introductions -
11-6-91	Penalty Verdict: Death -
11-7-91	Certification
12-16-91	Motion for delay - Hrg. set for 12-20-91 is con't to 1-10-92 at 8:30a.m. Sentencing set for 1-10-92 to 1-31-92 at 8:30 a.m.
9-23-91	MO - Day one jury selection
9-24-91	MO - Day 2 of jury selection
9-25-91	MO - Jury selection Day three
9-26-91	MO - Day 4 of jury selection
9-27-91	MO - Hovey Voir Dire Continues
9-30-91	MO - Day 6 of jury selection
10-1-91	MO - Day 6 of jury selection
10-3-91	MO - Jury selection day 9
10-4-91	MO - Day 10 of jury selection
10-7-91	MO - Day 11 Jury selection
10-8-91	MO - Day 12 jury selection
10-9-91	MO - Day 13 of jury selection
10-10-91	MO - Day 14 of jury selection
10-11-91	MO - Day 15 of jury selection
10-15-91	MO - Haircut for defendant
10-16-91	MO - Day 18 of jury selection
10-16-91	MO - Jury trial - 1st day
10-17-91	MO - Pre-Trial motions
10-21-91	MO - Day one of jury trial
10-22-91	MO - Day two of jury trial
10-23-91	MO - Day 3 of jury trial
10-24-91	MO - Day 4 of jury trial
10-25-91	MO - Day 5 of jury trial
10-28-91	MO - Day 6 of jury trial
10-29-91	MO - Day 7 of jury trial
10-30-91	MO - Day 8 of jury trial
10-31-91	MO - Day 9 of jury trial
11-1-91	MO - Day 10 of jury trial
11-4-91	MO - Day 11 of jury trial
11-5-91	MO - Day 12 of jury trial

9-23-91 thru 11-5-91 out of date order
(Con't pg 177)

(Con't From Page 176)

11/6/91	MO - Jury Deliberation & Verdict - Motions to be heard: 12/20/91 @ 9: a.m. - Probation Report & Judgment: 1/10/92
11/6/92	MO: Probation Referral: The referred of this case to probation is vacated pending the hrg. on Motions scheduled for 12/20/91
12/16/91	Order For Jury Names & Addresses
12/18/91	Request for Extension of time in which to file Points & Authorities; Waiver of time (hrg. 12/20/91)
11/13/91	Jury List
12/20/91	MO - Hrg. Re Motions for Delay: All rulings on motions will be on 2/21/92; Probation report on 3/13/92
1/10/92	Motions for New Trial
1/15/92	Exhibit #1
1/15/92	Exhibit #2
1/15/92	Exhibit #3
1/31/92	Opposition to Motion for New Trial
2/12/92	Notice of Motions & Motion to Reduce Penalty under P.C. 190.4(e) 3/13/92 @ 9 am
2/12/92	Response to Opposition
10/23/91	Declaration in Support of Request for Subpoena
10/23/91	Declaration in Support of Request for Subpoena
10/23/91	Declaration in Support of Request for Subpoena
11/4/91	Request to Conduct film and electronic media coverage and order
2/21/92	MO - fail Management Issues
2/21/92	MO - Motion for New Trial &

	Support thereof & Opposition Thereto Hrg. 3/13/92 9:00 a.m.
3/6/92	Opposition to defendant's motion for modification of the death penalty verdict (Penal Code section 190.4)) Hrg. 3/13/92 @ 9:00 a.m.

(Con't From Page 176)

ENTRIES ALL THE SAME UP TO 3/6/92 ENTRY AND THEN CONTINUES AS FOLLOWS:

4/3/92	Letter from Court Administrator & Clerk of the Supreme Court dated 4/1/92
4/10/92	Letter to Court Admin. & Clerk of the Supreme Court dated 4/10/92
4/13/92	Request of Court Reporter's for an extension
4/30/92	Letter from Madera Superior Court dated 4/28/92 to Court Admin., CA Supreme Court

(Cont. to page 178)

(Con't From Page 177)

5/26/92	Request from Supreme Court For Court Reporter's - Grant
5/27/92	Letter to Court Admin., CA Supreme Court dated 3/27/92
5/10/93	In Bank
5/10/93	Letter from Supreme Court appointing Donald J. Howath, Esq.
6/3/93	Application for Extension of Time to Request Correction of the Record in the Trial Court
6/3/93	Supreme Court ltr granting request for extension of time
7/20/93	Letter from Donald J. Howath
7/20/93	Application for second extension of time
7/26/93	Ltr. from the Supreme Ct. granting extension of time to 9/20/93
9/20/93	Ltr. from the Supreme Ct. granting Extension of Time to 10/20/93
10/21/93	Ltr. from the Supreme Ct. granting Extension of Time to 11/19/93
11/17/93	Application for Fifth Extension of Time to Request Correction of the Record in the Trial Court
11/22/93	In Bank from Supreme Court for Extension Until 12/3/93
12/2/93	Application for sixth extension of time to request correction of record in trial court
12/7/93	Letter from Supreme Court granting extension to 12/23/93
12/20/93	Application for seventh extension of time to request correction of record in trial court

12/22/93	Letter from Supreme Court granting extension to 1/12/94
1/12/94	Application for eighth extension of time to request correction of record in trial court
1/19/94	Letter from Superior Court granting extension to 3/18/94
2/22/94	Notice of Change of address of counsel and telephone number
3/1/94	Amended notice of change of address & telephone number
3/22/94	Application for ninth extension of time to request correction of record in the trial court
3/25/94	Application of appellant is granted [?] including Maybe - 1994 for request correction of record on appeal
5/10/94	Application for 10th extension of time to request correction of record in trial court
5/11/94	Application of appellant granted to May 13 - 1994 to request recorrection of record on appeal

(Con't From Page 178)

5/13/94	Defendant's request for Sequential Designation of the Record, Correction of Transcripts, Additional Record on Appeal, to examine sealed transcripts and to settle record on appeal
5/26/94	Copy of Letter from Attorney General Re: Informal Response to Appellant's request
6/7/94	Letter from Att. Donald Howath dated 5/23/94

[The above docket sheet entries are copies of handwritten entries made by different people and have been interpreted by a typist as best as she could]

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF REVERSAL BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (BETTY B. FLETCHER, STEPHEN REINHARDT, AND ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX V

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

Petitioner and Appellant, 92-15

v.

DANIEL B. VASQUEZ, Warden, San Quentin State Prison,

Respondent and Appellee.

On Appeal from the United States District Court
for the Eastern District of California
No. CIV-F-92-5167-REC-P

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

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BEST AVAILA

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ABLE COPY

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

Petitioner and Appellant, 92-15828

v.

DANIEL B. VASQUEZ, Warden, San Quentin State Prison

Respondent and Appellee.

INTRODUCTION

Appellee hereby petitions for a rehearing and suggests a rehearing en banc of the Court's opinion, filed May 26, 1995, reversing the District Court's dismissal without prejudice of appellant's habeas corpus petition on grounds of abstention under comity because appellant's case was not yet final since it is still pending in the California Supreme Court. Rehearing

should be granted because (1) the Court's purported finding of "extraordinary delay" to justify permitting appellant to attack the guilt phase of his murder conviction in the federal courts on habeas corpus while his penalty appeal is pending in the state courts is not supported by the state record, is contradicted by the state record, and lacks any evidentiary support, and (2) because permitting federal review in the absence of a final judgment is contrary to the law of abstention under comity.

ARGUMENT

I.

REHEARING SHOULD BE GRANTED BECAUSE THERE IS NO EVIDENCE TO SUPPORT THE PANEL DECISION FINDING OF EXTRAORDINARY DELAY

Appellee objects to this Court's purported finding of "extraordinary delay" in this case based on the mere fact that Appellant Phillips was convicted in 1980, that the California

Supreme Court reversed the death penalty and affirmed the guilt conviction in 1985, and that Phillips was not resentenced to death until 1992 with his automatic appeal pending since 1993.

First, the question of delay was never an issue considered in the questions posed in this Court's order to show cause. Thus delay was never briefed by appellee. Delay only came up for the first time at oral argument and counsel for Appellee had not prepared to discuss the question of delay. It is patent from the *full* record that most of the delay was of Phillips' own choosing, since he was quite active in his opposition to any penalty retrial.[1/]

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1. Appellee's problem is that the way this case has developed there is no record before this Court, other than the briefing on the order to show cause which was limited to answering three questions and did not deal with the issue of delay. Presumably the record before this Court does contain the instant petition for writ of habeas corpus filed in the District Court, and whatever documentation appellant's counsel provided the Court in April 1995 regarding the Madera County Superior Court docket sheets for the murder trial and two habeas corpus petitions filed in the California Court of

Accordingly, appellee submits the following facts in regard to appellant's capital case should be considered.

Appellant was arrested for murder on March 17, 1978, and thereafter extradited to California. The Information charging capital murder was filed in Madera County Superior Court on July 16, 1979. On January 21, 1980, appellant's jury trial commenced. On February 20, 1980, appellant was sentenced to death. Appeal to the California Supreme Court is automatic under Penal Code section 1239, subdivision (b).[2/]

Appeal, Fifth District, after this Court first requested counsel for appellee to send copies of the Clerk's Transcripts for appellant's initial murder trial and his penalty retrial (which contained entries for his state habeas corpus proceedings as well) and then withdrew that request. While appellant has listed all his state habeas corpus filings in his petition filed in the District Court, the Clerk's Transcripts for his penalty retrial, which includes those habeas corpus proceedings, contains all of appellant's pleadings utilized to delay his penalty retrial. With this in mind, appellee will attempt to establish what has taken place, and when, in this case. Copies of these Clerk's Transcripts have already been prepared and are still available to this Court on request.

2. This information comes from the Clerk's Transcripts

On his automatic appeal, appellant first filed a motion for summary reversal on November 17, 1980. Appellee opposed the motion which was denied on December 24, 1980. The Appellant's Opening Brief was filed on or about January 9, 1981. The Respondent's Brief was filed on February 6, 1981. Oral argument was on October 4, 1982. On February 23, 1984, the Supreme Court requested simultaneous supplemental briefing directed to specific questions the court had, due in 30 days. Supplemental briefs were filed. On May 29, 1985, appellee filed a motion to expedite issuance of the opinion. On December 31, 1985, in *People v. Phillips*, *supra*, 41 Cal.3d 29, the California Supreme Court affirmed appellant's conviction for murder but reversed the death penalty. On January 18, 1986, appellee filed a petition for

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of appellant's first trial, from the petition filed in the District Court, and from *People* v. *Phillips*, 41 Cal.3d 29, 222 Cal.Rptr. 127, 711 P.2d 423 (1985).

rehearing, which was denied on February 20, 1986, and the remittitur issued.[3/]

On March 7, 1986, at the hearing on the remittitur, appellant waived all conflicts regarding his being represented by attorney Thomas Mills, and waived statutory time for trial. On April 10, 1987, appellant filed (1) a motion to strike the death penalty as disproportionate, (2) a motion for an in camera hearing regarding a petition for writ of habeas corpus attacking the guilt phase of appellant's prior jury trial, (3) a motion to exclude nonstatutory aggravating evidence, (4) a declaration of co-counsel seeking to (1) have the jury sequestered throughout his penalty retrial; (2) have all trial spectators security searched; (3) that all witnesses be security searched; (4) that all witnesses be excluded prior to and after their testimony; (5) for daily transcripts; (6) to exclude

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3. These facts can be found in the California Supreme Court's docket entry for *People* v. *Phillips*, Crim 21374; appellee has copies of all relevant filings.

photographs of victim Bruce Bartulis; (7) to exclude photographs of victim Ronald Rose; (8) to exclude all nondiscovered evidence; (9) to examine non-resident Bob Mayo by commission; and (10) to refrain from reading appellant's prior convictions to the jury, (5) a motion to suppress evidence of appellant's intercepted jail mail and the tape recordings of the telephone conversations between himself and Richard Graybill and between Richard Graybill and Sharon Colman, and (6) a motion to exclude certain evidence. On April 22, 1987, the trial court granted the request of appointed co-counsel John Barker to withdraw from representing appellant, and on April 23, 1987, attorney Marshall Hodgkins was appointed co-counsel to represent appellant. On July 17, 1987, the People filed points and authorities in opposition to appellant's motions (1) to suppress evidence of letters and telephone conversations; (2) to exclude evidence of the vehicle, (3) to exclude non-statutory aggravating evidence; (4) to strike the death penalty; and (5)

to exclude photographs of the victims and to prohibit witnesses from discussing the case. On December 4, 1987, the request to sequester the jury was denied. The motion to search spectators and witnesses was granted, to exclude photographs was denied, subject to reconsideration, and to exclude all non-discovered evidence was granted. The requests to examine on commission and that priors not be used was granted. The court denied any further hearing on the motion to suppress, finding the issues had already been litigated. The motions to exclude evidence of the vehicle and to strike the death penalty were continued. The motion to exclude non-statutory evidence in aggravation was denied, subject to being reconsidered if requested. On January 25, 1988, following a hearing,[4/] the trial court denied appellant's ancillary motion re habeas corpus for an in camera hearing. On April 8, 1988, appellant filed a

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4. At that hearing, appellant withdrew his motions to strike the death penalty as disproportionate and to exclude evidence of the vehicle and some photographs.

petition for writ of habeas corpus. On August 28, 1989, appellant was ordered removed from San Quentin prison to be housed in the Madera County Jail pending outcome of his penalty retrial, along with being granted a series of exceptionally special privileges while housed in the Madera County Jail.[5/] Upon request of Madera County Counsel for reconsideration of the above orders, the transportation order was revoked and the matter set for hearing. On September 21, 1989, the Madera County Counsel filed an opposition to appellant's motion for appointment of a court master. On October 13, 1989, the motion was denied. (CT 1138.) On October 13, 1989, appellant was represented by Katherine Hart, with himself as co-counsel.[6/] On October 30, 1989, the trial court's orders of October 23, 1989, granting appellant pro

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5. This was apparently based on appellant's request for extensive pro per privileges.

6. This is the first indication in the record that attorneys Mills and Hodgkins were no longer representing appellant. When they actually dropped out of the case is not specified.

per privileges, but less generous in the extra privileges granted, and ordering appellant removed from San Quentin and housed in Madera County Jail pending the outcome of the penalty trial, were filed. On November 30, 1989, appellant requested transcripts of all proceedings from the time of the filing of the complaint through sentencing be prepared for the purpose of filing a pretrial writ. On December 8, 1989, the court filed a temporary order re appellant's jail accommodations pending the petition for reconsideration.[7/] On December 22, 1989, appellant filed a declaration in support of ex parte "confidential filing." On January 4, 1990, the habeas corpus evidentiary hearing commenced. Thereafter, regarding certain motions made by appellant, the court granted the motions for a telephone, for additional reading lamps, and for a portable recording device. On January 5, 1990, the evidentiary portion

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7. Both county counsel and appellant sought reconsideration of the pro per status order dated October 23, 1989.

of the habeas corpus hearing recommenced. After argument by counsel, the matter was taken under submission. On February 14, 1990, appellant's petition for writ of habeas corpus was denied. On March 2, 1990, an amended order granting appellant extensive pro per privileges was filed. On July 18, 1990, appellant's request for copies of all documents and transcripts relevant to his pretrial petition for writ of habeas corpus was filed. On November 19, 1990, appellant challenged Judge DeGroot pursuant to Code of Civil Procedure section 170.6. On January 4, 1991, appellant's section 170.6 motion was granted; another judge would hear the case. On May 9, 1991, appellant's petition for writ of habeas corpus was denied by the Court of Appeal, Fifth Appellate District and the stay order of August 16, 1990, vacated. On August 2, 1991, appellant filed a motion under Penal Code section 1424 to recuse the entire office of the Madera County District Attorney. On August 13, 1991, the District Attorney opposed the motion to recuse his entire

office as did the Attorney General. On that same August 16, 1991, appellant filed a habeas corpus petition. Following a hearing on August 16, 1991, the trial court denied appellant's motion to recuse the Madera County District Attorney's Office. On August 29, 1991, the People filed a motion for discovery from the defense. On September 3, 1991, the order denying appellant's August 16, 1991, petition for writ of habeas corpus was filed. On September 12, 1991, appellant filed requests for a lap-top computer and for additional legal interview time, which were granted. On October 1, 1991, a stipulation further amended the order concerning his pro per privileges. On September 23, 1991, appellant's jury trial commenced. On November 6, 1991, the jury verdict was death. On January 10, 1992, appellant filed a motion for a new trial, which the People opposed on January 31, 1992. On February 12, 1992, appellant filed a response to that opposition. The motion for a new trial was heard on February 21, 1992, and denied. On February 12, 1992, appellant filed

a motion to reduce penalty under Penal Code section 190.4, subdivision (e). On March 6, 1992, the People filed an opposition to appellant's motion to modify the death penalty verdict. The matter was heard on March 13, 1992, and denied. On that same March 13, 1992, appellant was sentenced to death.[8/]

According to appellant's habeas corpus petition filed in the District Court, on April 8, 1988, appellant filed a habeas corpus petition in the Madera County Superior Court. In November 1988 there was an evidentiary hearing. On January 14, 1989, the petition was denied. Petition p. 2. On November 18, 1988, appellant filed a second habeas corpus petition in the Madera County Superior Court. On January 6, 1988, the court issued an order to show cause. On January 4-5, 1990, there was an evidentiary hearing. On February 14, 1990, the petition was denied. Petition pp. 2-3. On August

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8. This all comes from the Clerk's Transcript of appellant's penalty trial.

10, 1990, appellant filed a third habeas corpus petition with the California Court of Appeal, Fifth Appellate District. On August 16, 1990, that court stayed the penalty retrial. The California Attorney General filed a response brief, and Phillips filed a traverse. On May 9, 1991, the petition was denied and the stay order vacated. Petition pp. 7-9. On May 20, 1991, appellant filed a petition for review of the Fifth District Appellate Court's denial of his petition with the California Supreme Court. On July 17, 1991, the petition was denied. Petition p. 9. On August 16, 1991, appellant filed a fourth habeas corpus petition in the Madera County Superior Court. On August 30, 1991, the petition was denied. Petition pp. 9-11. On September 13, 1991, appellant filed a habeas corpus petition in the Fifth District Court of Appeal. On September 18, 1991, the petition was denied. Petition p. 12. On September 18, 1991, appellant filed a habeas corpus petition in the California Supreme Court. On September 23, 1991, the petition was denied. Petition pp. 12-13.

Appellant filed the instant petition for writ of habeas corpus in the Federal District Court for the Eastern District.[9/] On March 12, 1992, the petition was denied without prejudice because of appellant's pending capital appeal on the same case in the California Supreme Court. On May 14, 1992, the District Court denied appellant's request for a certificate of probable cause to appeal. On June 18, 1992, this Court granted appellant's request for a certificate of probable cause. On August 26, 1992, this Court set a briefing schedule: appellant's opening brief due October 13, 1992, appellee's brief due November 30, 1992, and appellant's reply brief due December 21, 1992. On October 1, 1992, counsel was appointed to represent appellant and ordered to file a brief within 60 days on the question of whether the appeal should be dismissed for lack of exhaustion. Appellee was given the

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9. The petition is dated February 28, 1992; the proof of service is dated March 3, 1992. The Attorney General's copy was received on March 9, 1992.

option of responding within 21 days of receipt of that brief. On October 16, 1992, this Court cancelled the briefing schedule of August 26, 1992, and deferred to the briefing schedule set on October 1, 1992. On December 2, 1993 -- no brief by appellant's counsel having been filed as ordered on October 1, 1992 -- this Court issued an order to show cause, asking that three questions be answered within 30 days of receipt of the order. On December 27, 1993, appellee filed its return with this Court. On October 11, 1994, this Court heard oral argument on the order to show cause. On May 26, 1995, this Court issued the instant opinion in this case.

The time between appellant's arrest in March 1978 and conviction and sentence in February 1980 cannot be characterized as an unjustified delay since it involved extradition in a capital case. Likewise, it would be a mischaracterization to call the time between the filing of the appellate briefs in January and February 1981, and the decision on December 31, 1985, as an unjustified delay since

the California Supreme Court took extra pains with this case, requesting supplemental briefing in areas of concern before reversing the penalty, all to appellant's benefit. It is clear that the delay between the 1985 reversal of the penalty and the penalty retrial in late 1991 was intentionally caused by appellant. The delay following the District Court's denial of appellant's habeas corpus petition in March 1992 and this Court's reversal of that ruling on May 26, 1995, is attributable to appellant and this Court. There just was no "extraordinary delay" calling for the ruling this Court has made.

In regard to any delay in the correction of the trial transcripts, respondent submits the bulk of the delay was caused by appellant. He did something unique at his penalty retrial; he tape recorded it. As noted at oral argument his proposed correction to the record is based on listening to the trial tapes and comparing them with the trial transcript. This is a laborious time consuming process. Counsel for appellant received at least 10 extensions of time to make corrections to

the record. The paralegal doing this for appellee (after first having to obtain a set of tapes and Phillips' tape recorder) is on tape 22A, only tapes 22B and 23 remain. Thus, the marathon record correction procedure is nearing an end. If appellant had not utilized these tapes this could have concluded within weeks of appellant's proposed corrections.[10/]

Thus, there just is no evidence to support this Court's finding of "extraordinary delay." Any delay in the state courts was either legitimate and to appellant's benefit, or was the direct result of appellant's delaying tactics.

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10. In this regard, appellee would note that the normal practice of capital defendants is to use the record correction process as a *delay* tactic. The corrections are petty and rarely substantive. Appellee has not sat doing nothing during this delay. The Statement of the Case and the Statement of Facts have already been written, and counsel for appellee merely awaits the Appellant's Opening Brief.

II.

REHEARING SHOULD BE GRANTED BECAUSE WITHOUT EXTRAORDINARY DELAY THIS IS NO LONGER THE RARE CASE WHERE EXCEPTIONAL CIRCUMSTANCES OF PECULIAR URGENCY ARE SHOWN TO EXIST TO AVOID ABSTENTION UNDER COMITY

"[C]omity was the basis of the exhaustion doctrine: 'it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only "in rare cases where exceptional circumstances of peculiar urgency are shown to exist."'" *Rose v. Lundy*, 455 U.S. 509, 515-516; 71 L.Ed 2d 379, 102 S.Ct. 1198 (1982).

Appellee has already established in Argument I, *supra*, that there is no factual basis to support a finding of extraordinary delay.

Appellee also takes exception to this Court's finding that "No further review of the guilt phase in the state court is available." In his Response to Order to Show Cause filed with

this Court, appellant's counsel has specifically stated at page 2 that in regard to his additional appointment to represent appellant in his pending capital appeal, "My appointment includes guilt habeas corpus petitions" that had not been raised earlier in the California Supreme Court. "I would be paid only for habeas corpus proceedings directed to guilt issues grounded upon new facts not reasonably available to the defense at the time of the prior habeas corpus petitions." It is thus patent that appellant still believes he has available to him collateral review of the guilt phase in the state courts.[11/] The guilt phase is thus *not* final.

In addition, appellee challenges the point that "during so long a delay, there is a substantial likelihood that witnesses will die or disappear, memories will fade, and evidence will become unavailable. In short, the opportunity for a fair trial

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11. Appellee of course reserves the right to procedurally challenge any guilt phase issues that might be raised on state habeas corpus, if such objection is available. *Russell v. Rolff*, 893 F.2d 1033 (9th Cir. 1990).

diminishes as each day passes." Not so in this case. At the 1991 penalty retrial there was no problem with witnesses. The death of Richard Graybill was used by appellant to his advantage by presenting evidence through new witnesses that Graybill could not rebut.[12/]

Not being a rare case and state action not being final, the District Court's abstention under comity was proper.

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12. In regard to footnote 4, there is an error. This Court assumes that appellee was not properly served the petition "potentially depriving it of an opportunity to contest whether he fully exhausted state remedies for the claims within the petition." This is incorrect. The state was served. The petition is dated 28 February 1991 (Petition p. 33), but the proof of service is dated March 3, 1992. Appellee received the petition on March 9, 1992. It was the quick action by the District Court dismissing the petition without prejudice on March 12, 1992, before appellee had any idea what action to take in regard to the petition, not lack of service, that left appellee no opportunity to claim failure to exhaust, if such remedy is available. In this regard, since this is only a guilt phase challenge it should not be considered a capital case for habeas corpus purposes. Thus, *Rose v. Lundy*, *supra*, 455 U.S. 509, 521-522 controls; Local rule of the Eastern District, Rule 191(h)(5) is inapplicable.

CONCLUSION

For the foregoing reasons, appellee respectfully submits that rehearing/rehearing en banc should be granted.

Dated: October 3, 1995.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

ROBERT R. ANDERSON
Senior Assistant Attorney General

WILLIAM G. PRAHL
Deputy Attorney General

EDMUND D. McMURRAY
Supervising Deputy Attorney General

Attorneys for Respondent

EDM:msd

DECLARATION OF SERVICE BY MAIL

Re: Richard Louis Arnold Phillips **No. 92-15828**

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

PETITION FOR RHEARING AND SUGGESTION FOR REHEARING EN BANC

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Donald J. Horvath
Attorney at Law
43033 Glacier Lane
Coarsegold, CA 93614

Daniel B. Vasquez, Warden
California State Prison
San Quentin, CA 94964

Richard Lewis Arnold Phillips
P.O. Box C-13707
Tamal, Ca 94964

Each said envelope was then, on June 7, 1995, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 7, 1995, at Sacramento, California.

_____

DECLARANT

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF REVERSAL BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (BETTY B. FLETCHER, STEPHEN REINHARDT, AND ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX W

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS Petitioner and Appellant, vs. A. CALDERON, Warden, San Quentin State Prison Respondent and Appellee.	Case No. 92-15828

On Appeal from the
United States District Court
for the Eastern District
of California
No. CV-F-92-5167-REC-P

RESPONSE TO MOTION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

RICHARD L.A. PHILLIPS
Proceeding *pro se*
C-13707 3-E-111
San Quentin, Ca 94964

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DEATH PENALTY CASE

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS	)	Case No. 92-15828
Petitioner,	)	
vs.	)	RESPONSE TO MOTION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
A. CALDERON, Warden, San Quentin State Prison,	)	
Respondent.	)	

To: THE HONORABLE JUSTICIES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Appellant RICHARD LOUIS ARNOLD PHILLIPS respectfully submits the following **RESPONSE TO MOTION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**, per order of the panel of

fletcher, Reinhardt and Kleinfeld, filed 30 June 1995.

I.

STATEMENT OF THE CASE

Certificate of Probable Cause (CPC) issued by this Court to address:

> Is Petitioner precluded from federal review of guilt issues fully exhausted at the state level, while awaiting a second, unwaivable, automatic appeal in state court of penalty phase issues arising from a partial retrial?

In PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE (Appellant's Opening Brief) filed 4 January 1994, Appellant argued: "...the real question that must be answered is: From where do the alleged set of operative facts stem? (¶) Petitioner contends a bifurcated death penalty case must be considered ripe for federal review, cause-by-cause, NOT as a single issue." (Appellant's Opening Brief at pg. 7)

The entire panel, correctly, accepted this "bifurcated"argument. (The Opinion, pg

5803-4 rationale expanded upon in fn. 1)

Appellant defers all further legal arguments to advisory counsel. Appellant outlines the above only to offer comment on the issue of comity.

Do not be distracted by the smoke-and-mirrors of Appellee's motion for rehearing (MR). Who/what caused any past delay is not the issue. The only relevant question is how long will appellant be required to wait in the future for federal review of the constitutional validity of his conviction?

NO ONE, not this court, not the state of California, and not Appellant, can properly answer several critical questions. How long will the California Supreme Court take to review the second automatic appeal? Will there be a state habeas corpus evidentiary hearing ordered? If errors presented in either the second automatic appeal or state habeas are found to be prejudicial, how long will it take to conduct a third penalty

retrial? If again sentenced to death, how long would it take to exhaust state review of a third, unwaivable, automatic appeal as to penalty?

The entire panel acknowledged that the Seventh Circuit Court of Appeals properly addressed these exact bifurcated circumstances by granting *Burris* review. (the Opinion, pg. 5813-14) To rule otherwise is to tell your brethren in the Seventh Circuit they were wrong; and the United States Supreme Court that they were incorrect in their writing of *Brady v. Maryland*, 373 U.S. 83 (1963).

In sum, state review as to guilt is exhausted. The guilt half of this bifurcated case is final as to California law. Statutorily, the guilt issues are ripe for federal review. There is "no end in sight" as to the second prong of this bifurcated case.

II.

RESPONSE

1. THE STATE TRIAL COURT EXPRESSLY FOUND THAT APPELLANT WAS NOW ACTING FOR PURPOSES OF DELAY.

Appellee has not shown there was ever a statement from the trial court that appellant was acting for purpose of delay.

After spending pages 3 through 11 of the Motion for Rehearing (MR) to present finite detail of dates in pretrial motions and related proceedings, Appellee alleges that any time between 1985 to present spent on proper pre-trial preparation of this case was for purpose of delay; and is the fault of Appellant, and this Court. (MR at pg. 11-12)

To properly respond, background is required. (At this point I respectfully request this Court take notice of my SUPPLEMENTAL BRIEFING TO ORAL ARGUMENTS OF 11 OCTOBER 1994, accepted and filed 27 February 1995.) (27 Feb. 95 supp. br.)

The case originated in Madera County,

California. The city of Madera is the county seat, and the largest city in the county. At the date of original trial the population of Madera was approximately 20,000. There were two (2) superior court judges for the entire county.

Jury screening and selection lasted less than a day. Penalty and guilt trials lasted a bit more than a week. For all pre-trail motions, pre-trial preparation, conducting a trial as to guilt, another as to penalty, motion for new trial, and sentencing, attorney Paul Martin was paid $5,000.00 He gave $2,500.00 to his investigator.

Appeal of the finding of guilt and sentencing of death was taken to the California Supreme Court. There was no state habeas filed to accompany this appeal.

In the California Supreme Court's decision, at least three (3) times the Court stated that the issue(s) presented should be raised in writ of habeas corpus. *People v.*

Phillips, 41 Cal.3rd 29 (1985).

During preparation for penalty retrial, additional issues were discovered which were properly addressed in writ of habeas. As agreed upon within the defense team, Appellant was responsible for research and writing of all writs and appeals.

The trial court expressly found that no writ was for purpose of delay. On 8 April 1988 Appellant filed a writ of habeas corpus, (hereafter referred to as the "evidence writ.") The delay between filing the first writ on 8 April 1988 (MR pg. 6) and evidentiary hearing on 4 January 1990 was due in large part to Judge Bert Baily committing suicide, and several judges disqualifying themselves. (See 27 Feb. 95 supp. br.)

On 17 July 1989 the Honorable W.J. Harpham, presiding by appointment of the Chairperson, California Judicial Counsel, heard Appellant's petition to proceed *pro per*, co-counsel. The petition was granted

with the court stating:

> "The Court would further find as a result of this hearing, after having read the cited references, this is NOT a request in order to attempt to delay or prevent the orderly processes of the Court and in view of the comments, the Court does find also, I really believe the **defendant has been acting as co-counsel for some years...**" (RT 17 July 1989 Madera County Superior Court, Case No. 4852) (Emphasis added) (See also, Appellant's declaration in support of petition to proceed *pro se* with advisory counsel before this Court, filed 1 June 1992)

Appellee also blames Appellant's request for "a series of exceptionally special privileges" (MR at pg. 6) for delays. The provisions were in fact based on exhibits of orders for California capital defendants from other trial courts, and set no new precedent. The only possible delay here was from 28 August 1989 through 23 October 1989, while Madera County jail officials and Appellant reached an argument on details of the provisions order. (All provisions were at no expense to the court or county.)

On 18 July 1990, Appellant filed a

motion for discovery, as noted in MR pg. 7 Trial court record reflects that the court was clearly aware this was for the purpose of filing an additional writ of habeas corpus. The trial court had been apprised of this in July 1989. (This writ referred to hereafter as the "vehicle writ.") Again, the trial court expressly found this was not for purpose of delay.

Appellee then turn his complaining towards this Court. I am simply speechless on how to respond to allegations this Court caused delay!

Appellant had secured a CPC from this Court within six (6) months of the erroneous denial of review by the district court. Appellant filed several motions, including one to proceed *pro se* with Donald J. Horvath as advisory counsel. On 1 October 1992 the Court issued an order covering several points. After consultation with Appellant, Mr. Horvath wrote a letter to the Court,

seeking clarification. (Letter dated 16 October 1992.)

This Court took a bit more than a year to respond. Appellant does not feel it is his position to say what held up input on the issue(s) raised, but would say the next to the last paragraph of the concurring opinion (The Opinion, pg. 1518) is instructive as to the dilemma facing the Court. This circumstance has apparently never been before the Ninth Circuit.

In addition, Appellant submitted a petition for *pro se* provisions the Court chose not to address. This apparently had never been before the Ninth Circuit.

Neither of the above justify Appellant's aspersions upon the panel.

2. THE APPELLEE, IN HIS FACTUAL ALLEGATIONS, INTENTIONALLY ATTEMPTS TO PAINT A FALSE PICTURE OF STATE PROCEEDINGS.

It is Appellant's position that Appellee does not have a right to any information regarding attorney-client communications or

interactions unless disclosed by the bearer of that right.

Appellant presents limited disclosure only for the purpose of illustration. Noted in MR pg. 4-5, on 10 April 1987 counsel for Appellant filed several pre-trial motions, inclusive of a Motion to Strike the Death Penalty as Disproportionate. It was Appellant's opinion that there was no chance of prevailing in such a motion; and that such motions discredited Appellant's integrity before the Court, and would cause unnecessary delay and drain of resources of the defense. Further, since it was after all my life on the line, I had the final say-so on what was filed. Twelve (12) days later the Court had granted attorney John Barkeer's motion to withdraw, which was submitted at the insistence of Appellant.

Appellant is willing to submit *ex-parte* to this Court, a copy of the letters between attorney Barker and Appellant, which affirm

Appellant's position that no frivolous or delaying petitions would be allowed by Appellant.

Appellee attempts to characterize Appellant's exercise of his rights under California Code of Civil Procedures section 170.6 as delay. (MR at pg. 7-8) This is false and misleading. Judge DeGroot was never assigned Appellant's case. While a municipal court judge, DeGroot made several disparaging remarks about Appellant assisting another inmate with his legal work. The day after DeGroot was elected to sit on the Madera County superior court bench, Appellant filed paperwork to disqualify DeGroot. This motion was granted without response brief or hearing, via the mail, in less than one week.

Appellee states, falsely, that Appellant in fact benefited from the death of witness Richard Graybill by having another witness testify to matters Mr. Graybill could not be cross-examined about. (MR at pg. 14) A

review of the trial record reflects that the court refused to allow Tamara Nickols, the girlfriend Mr. Graybill lived with, to testify as to Mr. Graybill's statements to her immediately after the shootout.

TRIAL TRANSCRIPTS: Appellant takes exception to Appellee's fn. 10 Appellant has a constitutional right to a factual record. This Court in fact uses what Appellee calls a "unique" tactic (tape recording proceedings). Appellant didn't make the approximately 200 pages of errors in the transcripts. Therefore, Appellant didn't create the "delay"

CURRENT STATE PROCEEDINGS: On 12 January 1993 Appellant filed to have Mr. Horvath appointed by the California Supreme Court to represent Appellant on second automatic appeal. Mr. Horvath was appointed in May 1993.

For sake of discussion, Appellant assumes correction of the record will be

completed this year. This will mean the record was corrected in less than three (3) years., There are currently cases before the California Supreme Court where correction of the record has lasted in excess of seven (7) years and are still not complete. (Source: California Appellate Project.) There are currently in excess of 160 inmates under sentence of death in California, who at this time have not been appointed counsel. The average time for appointment of appellate counsel is in excess of four (4) years.

Appellant was sentenced to death 13 March 1992. Had he desired delay, why would he have affirmatively sought counsel?

This brings the discussion full circle: How long will the California Supreme Court take to review the second automatic appeal; will there be a state habeas evidentiary hearing ordered; if errors presented in either the appeal or state habeas are found to be prejudicial, how long will it take to

conduct a third penalty retrial; and if again sentenced to death, how long would it take to exhaust state review of a third, unwaivable, automatic appeal as to penalty?

One can only look to the track record of the California Supreme Court for answers. To follow the logic of Appellee's position is to say Appellant must wait until pat the year 2000 to seek federal review.

CONCLUSION

Appellee can attack the messenger all he likes, but it still comes down to the irrefutable fact: This remains the second oldest case from date of offense on California's death row - and there is still "no end in sight" as to final resolution of the second prong of this bifurcated case.

Comity will in fact be PROMOTED by allowing Appellant to go forward insofar as if Appellant prevails because it will obviate further state review as to penalty.

The state can only delay so long.

Sooner or later they are going to have to face the music - Appellant caught Madera County officials with their hand dirty. (See writ before district court.)

The motion for rehearing should be dismissed.

DATED: 14 July 1995

/s/
RICHARD L.A. PHILLIPS
Proceeding *pro se*
with advisory counsel

CERTIFICATE OF SERVICE

RICHARD L.A. PHILLIPS, Petitioner, vs. ARTHUR CALDERON, Warden Defendant.	)	Case No. 92-15828

I, the undersigned, hereby certify that I am a citizen of the United States, that I am over the age of 18 years, and am a party to the within entitled action. My business/residence address is:

C-13707 3-E-111
San Quentin State Prison
San Quentin, Ca 94964

I served a copy of the attached

RESPONSE TO MOTION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

upon the interested parties by placing a true and correct copy thereof in an envelope and sealing same, postpaid and by depositing same for delivery in the United States mail at San Quentin, California, per the restrictions of San Quentin State Prison, concerning inmate delivery to correctional authorities of

outgoing legal mail, addressed as follows:

STATE ATTORNEY GENERAL
P.O. Box 944255
Sacramento, CA 94244

A. CALDERON, Warden
San Quentin State Prison
San Quentin, CA 94964

I declare under penalty of perjury that the foregoing is true and correct; and that this was executed on the 14th day of July, 1995 in San Quentin, California.

/s/
RICHARD L.A. PHILLIPS
pro se with advisory counsel

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
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(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX X

DANIEL E. LUNGREN
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

No. 92-15828

Petitioner and Appellant.

v.

DANIEL B. VASQUEZ, Warden,
San Quentin State Prison.

Respondent and Appellee.

_____/

On Appeal From The
United States District Court
For The Eastern District of California
No. CIV-F-92-5167-RFC-P

REPLY TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Donald J. Horvath #53777
43033 Glacier Lane
Coarsegold, California
93614

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Advisory Counsel for
Appellant Richard Phillips

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

No. 92-15828

Petitioner and Appellant,

v.

DANIEL B. VASQUEZ. Warden, San Quentin State Prison,

Respondent and Appellee.

/

REPLY TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

ARGUMENT

1. APPELLEE HAS FAILED TO ADDRESS THE ANALYSIS OF THE MAJORITY OPINION IN THIS CASE.

A majority of this court correctly held that the abstention doctrine of *Younger v. Harris* 401 U.S. 37 (1971) does not preclude the instant habeas corpus petition because (1) appellant does not seek to enjoin an ongoing state proceeding and (2) "[t]he rule against staying a proceeding does not prevent us from deciding a related issue, even if that decision ultimately renders the state

proceeding moot." (Opinion, p. 5805.) The majority opinion's analysis of this issue does not rest upon a consideration of the delay--extraordinary or otherwise--in the state court proceedings.

A majority of this court correctly held that *Rose v. Lundy* 455 U.S. 509 (1982) does not preclude the instant habeas corpus petition because that case expressly states that a state prisoner is entitled to proceed in federal court with habeas corpus claims which have been exhausted in state court and appellant has raised only exhausted claims in the instant habeas corpus petition. (Opinion, pp. 5806-5807.) The majority opinion's analysis of this issue does not rest upon a consideration of the delay--extraordinary or otherwise--in the state court proceedings.

Thus, the majority opinion correctly concluded that the lower court erred upon both grounds asserted in support of its decision to

dismiss the instant petition upon analysis which does not rest upon the past delay in state court proceedings. In its petition for rehearing, appellee does not attack the majority's analysis or conclusion, based upon considerations other than past delay in state proceedings, that the trial court erred in dismissing this habeas corpus petition.

Therefore, appellee has failed to show--or even attempt to show--that the majority opinion is wrong.

The majority opinion goes on to balance several jurisprudential concerns against appellant's right to a speedy determination of his federal attack upon the constitutional validity of his conviction of murder with special circumstances. The majority correctly concludes that this balance should be struck in appellant's favor. (Opinion, pp. 5808-5814.) The perceived "extraordinary delay" in state court proceedings is relevant only to this portion of the majority opinion.

2. ASIDE FROM ITS FAILURE TO ADDRESS THE LEGAL ANALYSIS OF THE MAJORITY OPINION, THE PETITION FOR REHEARING LACKS MERIT.

A. The Major Premise of The Petition For Rehearing Is False.

The main thrust of the petition for rehearing is that appellant is responsible for the past delays in the state courts. Appellee states. DIt is patent from the fun record that most of the delay was of PhillipsS own choosing. since he was quite active in his opposition to any penalty retrial." (Petition for Rehearing, p. 2.) Appellee states, "It is clear that the delay between the 1985 reversal of the penalty and the penalty retrial in late 1991 was intentionally caused by appellant." (Petition for Rehearing, p. 11.)

Appellee has failed to prove the major premise upon which the petition for rehearing rests--an assertion that appellant intentionally caused the past delays in state court proceedings. The alleged facts relied upon by appellee to support this assertion show only

that appellant vigorously litigated (1) his penalty retrial, (2) his pending appeal from the second death sentence, (3) his rights as a criminal defendant representing himself, and (4) collateral attacks upon his conviction by means of several state habeas corpus petitions.

Whether appellee likes it or not, appellant has a right to litigate these matters. Litigation takes time. Therefore, the fact that appellant has exercised his right to litigate important issues does not establish that he intentionally delayed the state court proceedings.[1]

Appellee relies upon the alleged fact that appellant filed motions in the state

[1] Since I believe the petition for rehearing is insufficient on the face of the argument advanced by apsellee, I will not address in detail the various penalty trial pleadings which apDellee asserts were filed for purposes of delay. Appellant will address some of appellee's more egregious false assertions regarding such matters in his reply.

penalty retrial proceedings. However, there is no showing that these motions were frivolous or filed for purposes of delay. Absent such a showing, the fact that motions were filed proves nothing. The alleged fact that some motions were denied does not establish that they should not have been filed; some of the motions were granted.

Appellee relies upon the fact that appellant litigated several habeas corpus petitions attacking his conviction in state courts. However, appellant was required to exhaust his state remedies upon such issues before filing a petition in federal court. The fact that appellant did what the law required of him proves nothing.[2]

---

[2] Upon one state habeas corpus petition, the Fifth District Court of Appeal stayed the penalty retrial for almost 10 months--from 16 August 1990 to 9 May 1991. (Petition for Rehearing, p. 8.) The Fifth District obviously did not consider this petition to be frivolous, appellant is not responsible for this delay unless he somehow is precluded from filing viable habeas petitions.

Appellee urges that appellant is responsible for the delay in certifying the record on appeal from the penalty retrial because he had the audacity to tape record the testimony and the tape recordings show transcription errors. (Petition for Rehearing, p. 12.) However, appellant is entitled to an accurate record on appeal, and it is not his fault that the court reporters cannot do their job.[3]

---

[3] 3. At footnote 10 of the petition for rehearing, appellee says "the normal practice of capital defendants is to use the record correction process as a *delay* tactic. The corrections are petty and rarely substantive." Since the record on this appeal does not support such an assertion, one can only presume this is a request for judicial notice of such normal practice. Footnote 10 is an Outrageous attempt to prejudice appellant. It should be ignored by this court. The issue raised by appellee is what appellant has done--not what other or nnormal" capital defendants may have done. "Normal" capital defendants probably do not push their cases to an early judgment as appellant is trying to accomplish on this very appeal. Therefore, it appears that appellant is not a "normal" capital defendant. In any event, judicial notice of the alleged normal practice of capital defendants clearly is improper.

Appellee implies that attorney Horvath, appellant's counsel on his direct penalty appeal, took unreasonable time to correct the record on appeal because Horvath obtained 10 extensions of time to file a motion to correct the record. (Petition for Rehearing, p. 12.) However, the extensions obtained by Horvath were required by the state of the record and did not unreasonably delay the direct appeal.

Horvath, who did not represent appellant at his second penalty trial, received the record on appeal on 11 May 1993--1,414 pages of clerk's transcript and 5,690 pages of reporter's transcript. Horvath filed an extensive (144 pages) motion to correct and augment the record one year later on 13 May 1994--aside from numerous reporter's transcript errors, many documents had been omitted from the clerk's transcript.

Appellee filed its final informal response to this motion on 28 June 1995--over a year after appellant's motion was filed.

Appellee did not contest appellant's request to augment the record on appeal to include numerous documents. Appellee did not contest a vast majority of appellant's requests to correct the reporter's transcripts.

Appellee implies that attorney Horvath improperly failed to file a pleading as ordered by this court on 1 October 1992. (Petition for Rehearing, pp. 10-11.) This also is not true. By letter to this court of 16 October 1992, Horvath properly expressed his concern regarding the ethical propriety of filing a pleading against the interests of appellant, who is his client.

Appellee states, "It is thus patent that appellant still believes he has available to him collateral review of the guilt chase in the state courts. (Petition for Rehearing, pp. 13-14.) This amazing conclusion is grounded upon statements of attorney Horvath. (Petition for Rehearing, p. 13.)

Again, appellee is wrong. Since Horvath was appointed by the California Supreme Court to represent appellant upon his appeal from the second penalty trial. Horvath inquired of the Supreme Court (1) whether his appointment included the duty to investigate guilt habeas corpus issues, and (2) whether he would be paid for work on habeas corpus petitions attacking the guilt adjudication. Horvath's attempt to ascertain the scope of his duties and the work for which he would be paid was proper and reasonable. Horvath made similar inquiry of this court.

However, an inquiry by Horvath regarding the scope of his duties proves only that Horvath was concerned about the scope of his duties. Such an inquiry certainly does not prove that either Horvath or appellant believes that collateral review of guilt issues is still available in state court as asserted by appellee!

In his declaration dated 26 February

1992 (Exhibit 3 to the habeas corpus petition) Horvath stated under oath:

"6. In my, oDinion, the adjudication the (sic. "that) Phillips is aullty of murder with special circumstances is final in California courts upon all issues raised in his federal habeas Corpus petition, Phillips cannot obtain further review of the guilt adjudication in California courts by direct appeal or writ petition upon the issues raised in his federal petition. I believe additional California habeas corpus petitions upon these grounds would be denied as repetitive of prior petitions which were denied."

This quotation is the only relevant portion of the record on appeal; nothing in the record rebuts Horvath's opinion. Appellee's unreasonable inference from Horvath's attempt to ascertain the scope of his duties clearly does not contradict or in any way rebut the above quotation.

Nothing has occurred since 26 February 1992 to change Horvath's sworn opinion. In fact, subsequent events indicate that Horvath's 1992 opinion is correct--the very events relied upon and distorted by appellee so indicate.

Horvath stated in response to this court's order to show cause:

"On 18 May 1993, Mr. Reichman called me on the telephone and stated the following: My appointment includes guilt habeas corpus pets to ons. However. Petitioner's two Previous habeas corpus pleadings filed in the California Supreme Court had been denied on the merits. Therefore, I would not be paid for doinrany habeas corpus issues attacking the guilt adjudication which had been raised in the prior pleadings; I would be paid only for habeas corpus proceedings directed to guilt issues grounded upon new facts not reasonably available to the defense at the time of the prior habeas corpus petitions." (Emphasis added.)

Appellee conveniently omitted the most important fact from Horvath's statement--the fact that the California Supreme Court indicated that appellant's prior pleadings attacking his guilt adjudication had been denied on the merits. The Supreme Court was not interested in seeing previously raised guilt issues again (which is why they would not pay Horvath to do the work). It is these very issues which are raised in the instant federal petition.

Finally, my experience with appellant

indicates that he is not trying to delay adjudication of his penalty appeal. If appellant was interested in delay, he simply could have waited several years for counsel on direct appeal to be appointed for him. Instead, appellant affirmatively asked me to represent him on appeal and thereby advanced his case by several years.

B. The Balance Between Jurisprudsential Concerns And Appellant's Right To A Speedy Determination of His Federal Attack Upon The Constitutional Validity of His Conviction Struck BY This Court Remains The Same Regardless of Who Caused The Past Delays In State Court Proceedings.

The 15 years of past delay does not disappear upon a conclusion that appellant caused some or most of such delay[4] this appeal remains the same--whether petitioner

---

[4] A conclusion that appellant caused much of the past delay would be relevant to the concurring opinion of Justice Kleinfeld since he grounds his opinion upon an equitable exception to the *Younger* doctrine. However, appellee has failed to show that appellant is responsible for the past delay. (Point 2-A above.)

must wait undetermined amount of additional time in the future before he is allowed to litigate his federal attack upon the consitutional validity of his state conviction. The answer remains "no" because the prejudice to appellant from future delay still outweighs relevant jurisprudential concerns for the reasons stated by the majority.

C. 28 U.S.C. Section 2254 Grants Appellant A Statutory Right To Proceed Upon His Federal Habeas Corpus Petition.

Section 2254 subdivision (a) provides in relevant part that a district court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States." (Emphasis added.) Appellant has filed such a petition.

Section 2254 subdivision (b) states an exception to the general rule--federal habeas

corpus relief cannot be granted unless the petitioner has exhausted his state remedies upon the federal claims asserted. Appellant's habeas corpus petition pleads exhaustion of his state remedies upon all federal claims asserted. (Habeas Corpus Petition. p. 15, ¶ 11.) Therefore, the exception does not apply and appellant has a statutory right to proceed upon his federal petition.

Appellee may, of course, take issue with this factual allegation and all other factual allegations made in appellant's habeas corpus petition in the district court. However, appellant's habeas corpus petition properly pleads a federal action authorized by statute; therefore, the district court erred in dismissing the petition.

By enacting section 2254 and thereby granting appellant a right to proceed upon his federal petition, Congress has resolved all relevant jurisprudential concerns in appellant's favor. Unless the statute is held

to be unconstitutional, federal courts are not free to disregard this statute by denying appellant his statutory right to proceed upon the instant habeas corpus petition.

D. The Petition For Rehearing Is Grounded Upon Alleged Facts Which Are Outside of The Record Dn Appeal.

The record upon this appeal consists of the habeas corpus petition filed in the district court and several state court dockets supplied by appellant upon request of this court. The petition for rehearing improperly and extensively relies upon facts allegedly shown by the full record of state court proceedings upon the penalty retrial which is not a part of the record on appeal. (See, Petition for Rehearing, fn. 1.)

CONCLUSION

The petition for rehearing lacks merit. Therefore, it should be denied.

Appellant Richard Phillips respectfully so prays.

DATED: 11 July 1995

Respectfully submitted,

/s/

Donald J. Horvath

Advisory Counsel For
Appellant Phillips

DECLARATION OF SERVICE BY MAIL

Re: Richard Phillips v. Daniel Vasquez
No 92- 15828

I, Donald Horvath. declare that I am over 18 years of age and not a party to the within cause; my business address is 43033 Glacier Lane, Coarsegold, CA 93614. I served a true copy of the attached

REPLY TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

on each of the following, by placing same in an envelope addressed respectively as follows:

Daniel E. Lungren, Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
Att: Edmund D. McMurry, Esq.

Mr. Richard Phillips
C-13707 5-E-71
San Quentin Prison
San Quentin, CA 94964

Each envelope was then, on 18 July 1995. sealed and deposited in the United States mail at Coarsegold, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 18 July 1995 at Coarsegold, California.

Donald J. Horvath

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX Y-1

DANIEL E. LUNGREN
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Chief Assistant Attorney General
ROBERT R. ANDERSON
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WILLIAM G. PRAHL
Deputy Attorney General
EDMUND D. McMURRAY
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Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

Petitioner and Appellant, 92-152

v.

DANIEL B. VASQUEZ, Warden, San Quentin State Prison,

Respondent and Appellee.

NOTICE OF LODGING

Respondent offers the following documents to be lodged with this Court under separate cover.

ITEM 1 -- Clerk's Transcipt, *People v. Phillips*, Madera County Superior Court No. 4852, Vol. I.

ITEM 2 -- Clerk's Transcript, *People v. Phillips*, Madera County Superior Court No. 4852, Vol. II.

BEST AVAILABLE COPY

ITEM 3 -- Clerk's Transcript, *People v. Phillips*, Madera County Superior Court No. 4852, Vol. III.

ITEM 4 -- Clerk's Transcript, *People v. Phillips*, Madera County Superior Court No. 4852, Vol. IV.

ITEM 5 -- Clerk's Transcript, *People v. Phillips*, Madera County Superior Court No. 4852, Vol. V.

ITEM 6 -- Clerk's Transcript, *People v. Phillips*, Madera County Superior Court No. 4852, Vol. VI.

ITEM 7 -- Clerk' Transcript, *People v. Phillips*, Madera County Superior Court No. 4852, Reconstructed Clerk's "C" file.

ITEM 8 -- Docket sheet, California Supreme Court, *People v. Phillips*, No. S004320 (first appeal).

ITEM 9 -- Docket sheet, California Supreme Court, *People v. Phillips*, No. S025880 (second appeal).

ITEM 10 -- Request from California Supreme Court for supplemental briefing on 8 questions in *People v. Phillips*, No. S004320/Crim 21374.

ITEM 11 -- Draft of respondent's Statement of the Case in *People v. Phillips*, No. S025880.

ITEM 12 -- Appellant's Defendant's Request for Sequential Designation of the Record, Correction of Transcripts, Additional Record on Appeal, to Examine Sealed Transcripts and to Settle Record on Appeal, containing respondent's responses thereto, in *People v. Phillips*, No. S025880.

ITEM 13 -- Respondent's Informal Response to Appellant's Request for Sequential Designation of the Record, Correction of Transcripts, Additional Record on Appeal, to Examine Sealed Transcripts and to Settle the Record on Appeal in *People v. Phillips*, No. S025880.

ITEM 14 -- Letter to trial court that respondent has completed the review of appellant's request for corrections to the transcript (the responses are set forth in Item 12) in *People v. Phillips*, No. S025880.

ITEM 15 -- Appellant's counsel's letter to trial court re response to respondent's disagreements with appellant's request for transcript corrections in *People v. Phillips*, No. S025880.

CONCLUSION

Accordingly, respondent respectfully asks that the attached materials be lodged with this Court and included in the record before this Court.

Dated: July 19, 1995.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

ROBERT R. ANDERSON
Senior Assistant Attorney General

EDMUND D. McMURRAY
Supervising Deputy Attorney General
State Bar No. 42985

Attorneys for Respondent

EDM:msd

DECLARATION OF SERVICE BY MAIL

Re: Phillips v. Vasquez **No. 92-15828**

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

NOTICE OF LODGING

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Donald J. Horvath
Attorney at Law
43033 Glacier Lane
Coarsegold, CA 93614

Daniel B. Vasquez, Warden
California State Prison
San Quentin, CA 94964

Richard Lewis Arnold Phillips
P.O. Box C-13707
Tamal, CA 94964

Each said envelope was then, on July 19, 1995, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 19, 1995, at Sacramento, California.

_____

DECLARANT

Stamped:

"RECEIVED
Cathy Catterson, Clerk
U.S. Court of Appeals
Jul 21, 1995
Filed _____
Docketed 7/24/95 ew

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
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(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX Y-2

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
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ROBERT R. ANDERSON
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WILLIAM G. PRAHL
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Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Counsel for Petitioners

DANIEL LUNGREN LETTERHEAD

July 18, 1995

United States Court of Appeal
for the Ninth Circuit
Cathy Catterson, Clerk
121 Spear Street, P.O. Box 193939
San Francisco, CA 94119-3939

RE: Phillips v. Vasquez
No. 92-15828

Dear Ms. Catterson:

As indicated in Footnote 1 to respondent's petition for rehearing in the above-entitled matter, the record presently before this Court does not contain an accurate account of what went on in the state court proceedings. I understand that the Court does have the Madera County Superior Court docket sheets, which were provided by appellant's counsel after oral argument. I have obtained copies of the docket sheets which the Madera County Clerk's Office provided to appellant's counsel. After reviewing these docket sheets I feel those abbreviated entries fail to adequately explain what took place in the Madera County Superior Court following the penalty reversal by California Supreme Court. I feel the Clerk's Transcripts of those proceedings, which this Court had initially requested from respondent, are more complete and more informative. Accordingly, pursuant to the attached Notice of Lodging, respondent wishes to lodge those transcripts (consisting of 7 volumes) with the Court, along with the docket sheets from the California Supreme Court on both the appeals and the request for supplemental briefing 8 questions by that Court on the first appeal.

As further noted in the petition for rehearing, our office has already completed the Statement of the Case and the Statement of Facts for use in appellant's pending automatic appeal of his penalty retrial before the California Supreme Court and just await the filing of Appellant's Opening Brief. Accordingly, respondent is also lodging the already completed Statement of the Case to assist this Court in reviewing the Clerk's Transcripts.

Lastly, in order to aid this Court in its understanding of the developments in appellant's pending state appeal, respondent is lodging the relevant documents that have been filed in that case regarding correction and expansion of the appellate record.

If I may be of any further assistance, please do not hesitate to contact me.

Sincerely,

DANIEL E. LUNGREN
Attorney General

EDMUND D. McMURRAY
Supervising Deputy Attorney General

EDM:msd
Enclosures

DECLARATION OF SERVICE BY MAIL

Re: People v. Louis Arnold Phillips
No. S025880

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

LETTER TO UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Donald J. Horvath
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43033 Glacier Lane
Coarsegold, Ca 93614

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California State Prison
San Quentin, CA 94964

Richard Lewis Arnold Phillips
P.O. Box C-13707
Tamal, Ca 94964

Each said envelope was then, on July 19, 1995, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 19, 1995, at Sacramento, California.

_____

DECLARANT

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
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(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX Y-3

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Deputy Attorney General
EDMUND D. McMURRAY
Supervising Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
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Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

Petitioner and Appellant, 92

v.

DANIEL B. VASQUEZ, Warden, San Quentin State Prison,,

Respondent and Appellee.

MOTION TO LODGE DOCUMENTS

Pursuant to FRAP Rule 27 and 9th Circuit Rule 27-1, respondent moves to lodge the documents listed in the attached Notice of Lodging[1/] with this Court so they may be judicially noticed under Federal Rules of Evidence, Rule 201(b), 28 U.S.C.A.

1. The Notice of Lodging, and the documents listed therein, have already been received at the Ninth Circuit Clerk's Office.

As indicated in Footnote 1 to the respondent's petition for rehearing in the instant case, because of the unique way this case proceeded in the federal courts, the record presently before this Court is practically nonexistent. It does not contain an accurate account of what went on in the state court proceedings of appellant's initial state capital appeal and his retrial of the penalty phase following reversal by the California Supreme Court.

While the Court may have the docket sheets from the Madera County Superior Court, as provided by appellant's counsel following oral argument, they are not as complete as the Clerk's Transcripts. Likewise the docket sheets from the California Supreme Court on appellant's initial appeal in *People v. Phillips*, No. S004320/Crim.21374, and his pending appeal in *People v. Phillips*, No. S025880, show what has transpired during the pendency of the state appeals, as do the documents filed in the Madera County Superior Court regarding appellant's request for correction of the record on that pending state appeal.

The official record of the parallel state case is a proper object for judicial notice on the appeal of an

abstention order. *Lumen Const. Inc. v. Brant Const. Co. Inc.*, 780 F.2d 691, 697 fn 4 (7th Cir. 1985).

CONCLUSION

Accordingly, for the reasons stated, respondent respectfully asks that the Motion to Lodge Documents be granted.

Dated: July 24, 1995.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

ROBERT R. ANDERSON
Senior Assistant Attorney General

EDMUND D. McMURRAY
Supervising Deputy Attorney General
State Bar No. 42985

Attorneys for Respondent

EDM:msd

DECLARATION OF SERVICE BY MAIL

Re: Phillips v. Vasquez **No. 92-1528**

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

MOTION TO LODGE DOCUMENTS

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Donald J. Horvath
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Richard Lewis Arnold Phillips
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Tamal, CA 94964

Each said envelope was then, on July 24, 1995, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 24, 1995, at Sacramento, California.

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DECLARANT

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

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ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX Z

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22 July 1995

Ninth Circuit Court of Appeals
Cathy Catterson, Clerk
P.O. Box 193939
San Francisco, CA 94119-3939

RE: Richard Phillips on habeas corpus; 92-15828

Dear Ms. Catterson:

This is a reply to attorney Edmund McMurray's letter dated 18 July 1995 and "NOTICE OF LODGING" which I received on 21 July 1995.

Please bring this letter to the attention of the court.

Appellant Phillips objects to this court's consideration of the documents sent by appellee to this court without request from the court and without a formal motion to include the lodged documents in the record on appeal. Appellant further requests that the lodged documents immediately be returned to appellee.

Rule 10 of the Rules of appellate Procedure provides:

> "(a) The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases."

None of the documents lodged by appellee were filed in the district court. Therefore, none of the documents lodged by appellee properly may be included in the record on appeal.

As Item 11 of the lodged documents, appellee has sent this court a copy of its statement of the case in the state penalty appeal. However, appellee did not send appellant or me this document; neither appellant nor I have seen this document.[1]

Appellee's attempt to change the record on appeal after appellant filed his reply to the petition for rehearing should be denied upon the ground that appellee's request is very, very late.

Appellee was aware when it filed the petition for rehearing that the petition was grounded upon alleged facts outside of the record on appeal (Petition for Rehearing, footnote 1.) At latest, appellee's attempt to correct the record problem should have

---

[1] Although Mr. McMurray mentions a statement of acts on direct appeal in his letter, it appears that only the statement of case was sent to this court--it would, of course, be very improper and prejudicial for appellee to send this court its version of the facts. Since I don't have the document submitted, I cannot assess whether appellee's statement of the case says anything which is untrue or prejudicial to appellant.

been made when or shortly after the petition for rehearing was filed. A timely request would have allowed appellant an opportunity to respond. Instead, appellee waited until shortly before appellant's reply to the petition was due on 28 July 1995 (and after it actually was filed) to submit improper documents for consideration by this court.

Sincerely yours,

/s/

DONALD J. HORVATH

DECLARATION OF SERVICE BY MAIL

Re: Richard Phillips v. Daniel Vasquez
No. 92-15828

I, Donald Horvath, declare that I am over 18 years of age, and not a party to the within cause; my business address is 43033 Glacier Lane, Coarsegold, CA 93614. I served a true copy of the attached

HORVATH'S LETTER OF 22 JULY 1995 TO MS. CATTERSON

on each of the following, by placing same in an envelope addressed respectively as follows:

Daniel E. Lungren, Attorney General
P.O Box 944255
Sacramento, CA 94244-2550
Att: Edmund D. McMurry, Esq.

Mr. Richard Phillips
C-13707 5-E-71
San Quentin Prison
San Quentin, CA 94964

Each envelope was then, on 22 July 1995, sealed and deposited in the United States mail at Coarsegold, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 22 July 1995 at Coarsegold, California.

Donald J. Horvath

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX AA

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
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Counsel for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

(FILED JUL 31 1995, Cathy A. Catterson, Clerk, U.S. Court of Appeals)

RICHARD LOUIS ARNOLD PHILLIPS Petitioner and Appellant, vs. A. CALDERON, Warden San Quentin State Prison Respondent and Appellee.	Case No. 92-15828

On Appeal from the United States District Court for the Eastern district of California
No. CV-F-92-5167-REC-P

OBJECTION TO APPELLEE'S MOTION TO LODGE DOCUMENTS

RICHARD L.A. PHILLIPS
Proceeding *pro se*
C-13707 3-E-111
San Quentin, CA 94964

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43033 Glacier Lane
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DEATH PENALTY CASE

RICHARD LOUIS ARNOLD PHILLIPS
Proceeding *pro se*
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UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS Petitioner and Appellant, vs. A. CALDERON, * Warden, San Quentin State Prison Respondent and Appellee.	Case No. 92-15828 OBJECTION TO APPELLEE'S MOTION TO LODGE DOCUMENTS

TO: THE HONORABLE JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Appellant RICHARD LOUIS ARNOLD PHILLIPS respectfully submits the following OBJECTION TO APPELLEE'S MOTION TO LODGE DOCUMENTS, to supplement the State of California's Motion

for Rehearing and Suggestion for Rehearing En Banc.

*Mr. Arthur Calderon has succeeded Daniel B. Vasquez as Warden of San Quentin State Prison, and is substituted as opposing party pursuant to Federal Rules of Appellate Procedure 43 (c).

I.

BACKGROUND

Sometime between the 11 October 1994 oral arguments in the case at bar, and the issuance of the Opinion, filed 26 May 1995, an-unidentified male representing himself as a clerk of this Court, called the California Attorney General's office. This Clerk requested several dockets for various state courts pertaining to the Phillips (Appellant) case. After apparently encountering difficulty in obtaining what he was looking for, this Clerk then called Phillips' advisory counsel Donald Horvath and made the same request. Mr. Horvath promptly provided the requested dockets.

On or about 7 June 1995 (dated 6 June 1995) the Attorney General for the State of California (Appellee) filed a Petition for Rehearing and Suggestion for Rehearing En Banc.

On 30 June 1995 the Court issued an

Order to Phillips and advisory counsel Horvath, directing that a response to the Petition for Rehearing and Suggestion for Rehearing En Banc be filed by 28 July 1995.

On 19 July 1995 both Phillips and Horvath separately filed responses.

On or about 21 July 1995 (dated 18 July 1995) Appellee filed a Notice of Lodging; and a letter to Ms. Catterson, Clerk of this Court. Appellee lodged seven (7) volumes of Clerk's Transcripts from Madera County Superior Court No. 4852, and apparently a segment of his work product alleged to be his Statement of the Case for the pending second automatic appeal of the penalty retrial before the California Supreme Court. (No copy of the aforementioned were provided to either Phillips or Horvath.)

On 24 July 1995 Advisory Counsel Horvath filed a Letter Brief objecting to the Notice of Lodging; and document(s) referred to in the letter to Ms. Catterson.

On or about 26 July 1995 (dated 24 July 1995) Appellee filed a Motion to Lodge Documents.

II.

DISCUSSION

1. The Clerk's Transcripts

The facts of the entire case, inclusive of delays in state proceedings, are pleaded before the district court in Phillips' writ of habeas. This writ is part of the record transferred-to this Court. The California Attorney General attempts to make fn 4 of *Lumen Const. Inc. v. Brant Const. Co., Inc.*, 780 F.2d 691 697 (7th Cir. 1985) reach to the instant case as reason why the Court should review the trial Clerk's transcripts. Phillips argues this Court should not for the following reasons. In *Lumen* there were city agencies, building contractors, sub-contractors, etc. The following gives an idea of that litigation:

...Region Management filed claims with

> Valparaiso for amounts allegedly owing from Lumen. In response, Valparaiso withheld payments due to Brant, and Brant in turn withheld payments from Lumen... Brant filed an interpleader action... A week later, Lumen... filed a second state court suit... naming Brant as a defendant... In addition, Lumen filed claims against Brant with Valparaiso. Meanwhile, Region Management and defendant-appellee United States Fidelity & Guarantee Company ("Fidelity") filed various claims, counterclaims, and cross-claims in the original interpleader suit. g ...Lumen filed its answers to the claims raised by Brant, Region Management, and Fidelity and also filed its "Counterclaim, Cross-Claim and Third-Party Complaint." *Lumen, supra* at 693.

Lumen, "By a virtually identical document filed in the district court on the same day, Lumen initiated the instant federal action. *Lumen, supra* at 693 This created a concurrent jurisdiction problem which does not exist in the case at bar.

In addition, the documents transferred to the appeals court were "principally... copies of state court pleadings and orders . . . not in the record of the district court.... the official record of the parallel state case is a proper object

for Judicial notice." *Lumen, supra* at 697 fn 4.

In the case at bar, there is only one petitioner, with one writ and one opposition. Further, the instant case is distinguished from *Lemun* (a) because *Lemun* has nothing to do with writ of habeas, or criminal cases; and (b) because the case at bar has no "parallel state case."

NOTHING in the Clerk's transcripts speaks in any way to the relevant questions: Has Phillips fully exhausted as to state review, all issues contained in the writ before the district court? Is the issues in this writ now ripe for federal review?

If ever there was an issue that should be reviewed under the doctrine of "first impression," this is it. The California Attorney General has dumped seven (7) volumes of a county clerk's transcripts on the lap of this Court and essentially said, "Here's a stack of papers. Look through these,

second-guess the state trial court, and see if you can find something that was frivolous or for purpose of delay." OF NOTE is the fact Appellee has not pointed to a single issue in seven (7) volumes of clerk's transcripts for an example of alleged delay.

Unless and until such time as this Court is prepared to go through each and every page, filing, document, and call for the transcript of each actual proceedings, reviewing every packet of *in camera* proceedings sealed by the trial court, these trial clerk's transcripts should be returned and the Motion to Lodge denied.

2. Statement of the Case

Although not included in-the Motion for Lodging, in the Attorney Generals 18 July 1995 letter to Ms. Catterson, Clerk of this Court, Appellee states he is including what amounts to a print-out of some of his work product he has entitled Statement of the Case. This is apparently to show: (a)

Appellee is diligently working on this case; or (b) an attempt to further muddy the waters and perhaps prejudice Phillips.

In either event, this print-out of work product was completed before the record of the retrial of the second prong in this bifurcated case is even corrected and certified by the trial court. This alleged Statement of the Case is in no way a part of the record on appeal and should be rejected and immediately returned to the Attorney General, without review.

III.

CONCLUSION

Appellee has not provided this Court with a single example, from the Clerk's transcripts or any other transcripts, of the trial court finding Phillips did not comport himself as a-n officer of the court in good standing.

Appellee has not provided a single example in the Clerk's transcripts or any

other transcripts, of the trial court or any state court finding Phillips was filing a frivolous motion, or acting for purpose of delay.

Appellee has failed to show Phillips was not entitled, indeed invited, to fully litigate guilt issues while at the same time preparing for retrial of the second prong of this bifurcated case.

Appellee has not offered any proof as to why his personal work product should be reviewed by this Court.

The Motion to Lodge should be denied.

DATED: 27 July 1995

/s/
RICHARD LOUIS ARNOLD PHILLIPS
Proceeding *pro se* with
advisory counsel

CERTIFICATE OF SERVICE

RICHARD L.A. PHILLIPS Petitioner, vs. ARTHUR CALDERON, Warden Defendant.	)	Case No. 92-15828

I, the undersigned, hereby certify that I am a citizen of the United States, that I am over the age of 18 years, and am a party to the within entitled action. My business/residence address is:

C-13707 3-E-111
San Quentin State Prison
San Quentin, CA 94964

I served a copy of the attached:

OBJECTION TO APPELLEE'S MOTION TO LODGE DOCUMENTS

upon the interested parties by placing a true and correct copy thereof in an envelope and sealing same, postpaid and by depositing same for delivery in the United States mail at San Quentin, California, per the restrictions of San Quentin State Prison, concerning inmate

delivery to correctional authorities of outgoing legal mail, addressed as follows:

STATE ATTORNEY GENERAL
P.O. Box 944255
Sacramento, CA 94244

A. CALDERON, Warden
San quentin State Prison
San Quentin, Ca 94964

I declare under penalty of perjury that the foregoing is true and correct; and that this was executed on the 27th day of July, 1995 in San Quentin, California.

/s/
RICHARD L.A. PHILLIPS
Pro se with advisory counsel

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
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PETITION FOR WRIT OF CERTIORARI

APPENDIX BB

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Deputy Attorney General
EDMUND D. McMURRAY
Supervising Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
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Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Counsel for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

No. 92-15828

Petitioner and Appellant,

v.

DANIEL B. VASQUEZ, Warden,
San Quentin State Prison,

Respondent and Appellee.

_____/

On Appeal From the United States
District Court
For The Eastern District of
California
No. CIV-F-92-5167-REC-P

OPPOSITION TO APPELLEE'S MOTION TO LODGE DOCUMENTS

Donald J. Horvath #53777
43033 Glacier Lane
Coarsegold, California 93614

Phone: (209) 658-7048

Advisory Counsel for
Appellant Richard Phillips

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS, No. 92-15828

Petitioner and Appellant,

v.

DANIEL B. VASQUEZ, Warden,
San Quentin State Prison,

Respondent and Appellee.
_____/

OPPOSITION TO APPELLEE'S MOTION TO LODGE DOCUMENTS

ARGUMENT

1. APPELLEE'S REQUEST THAT THIS COURT TAKE JUDICIAL NOTICE OF DOCUMENTS PREVIOUSLY LODGED SHOULD BE DENIED BECAUSE THE STATED GROUNDS FOR THE MOTION ARE FALSE.

In support of its motion for judicial notice, appellee says:

> "[T]he record presently before this court is practically nonexistent. It does not contain an accurate account of what went on in the State court proceedings of appellant's initial state capital appeal and his retrial of the penalty phase following reversal by the California Supreme Court. (Motion, p.

This simply is not true.

The record before this court includes the habeas corpus petition which was filed in the district court and dismissed by that court. The issue of whether the district court erred in dismissing the habeas corpus petition should be decided upon the record before the district court--i.e., upon the facts well pleaded and presented in appellant's habeas corpus petition.

To the extent that extraordinary delay in state court proceedings is material to this court's decision, the facts pleaded in the habeas corpus petition are sufficient to establish such extraordinary delay. habeas Corpus Petition, pp. 1-14.)

Appellee asserts in its motion that the present record does not contain "an accurate account" of state court proceedings. However, appellee has failed to show or even attempt to show that any fact regarding state court proceedings pleaded in appellant's habeas corpus petition (the present record) is not

accurate.

2. APPELLEE'S REQUEST THAT THIS COURT TAKE JUDICIAL NOTICE OF DOCUMENTS PREVIOUSLY LODGED SHOULD BE DENIED UPON THE GROUND THAT APPELLEE HAS FAILED TO SHOW THAT THE DOCUMENTS TO BE NOTICED ARE RELEVANT TO ANY ISSUE BEFORE THIS COURT.

As urged in Horvath's Reply To The Petition For Rehearing, the reasons for the past delay in state court proceedings are not relevant to the majority opinion. (Horvath Reply, Points 1, 2-B, and 2-C, pp. 1-2, 8-10.) In short, the past delay does not disappear upon a conclusion that appellant caused some of the delay; therefore, the balance of jurisprudential concerns against appellant's right to attack the constitutional validity of his conviction discussed by the majority does not change. Appellant has been granted a statutory right to proceed upon his petition which resolves the issue before this court in his favor. (28 U.S.C. § 2254.)

Although a conclusion that appellant

caused the delay in state court proceedings would be relevant to Justice Kleinfeld's concurring opinion, appellee has failed to show that the documents to be noticed establish that appellant is responsible for such delay. As urged in Horvath's Reply To The Petition For Rehearing, appellant had a right to litigate important issues in state court and cannot be held responsible for the resulting delay absent a showing that his pleadings are frivolous and, therefore, should not have been filed. (Horvath Reply, Point 2-A, pp. 2-8.)

Appellee has failed to show or attempt to show that the documents to be noticed include motions or other pleadings filed by appellant which are frivolous, and, therefore, support an inference that such pleadings were filed for purposes of delay. Therefore, appellee also has failed to establish that the documents to be noticed

are relevant to Justice Kleinfeld's opinion.[1]

3. APPELLEE'S REQUEST THAT THIS COURT TAKE JUDICIAL NOTICE OF DOCUMENTS PREVIOUSLY LODGED SHOULD BE DENIED UPON THE GROUND THAT THE REQUEST IS UNTIMELY.

Appellee previously lodged documents with this court without request of the court and without a formal motion.

By letter to the court dated 22 July 1995, attorney Horvath objected to appellee just sending documents to the court in this manner upon the grounds (1) that pursuant to Rule 10 of the Rules of Appellate Procedure the lodged documents could not properly be included in the record on appeal and (2) appellee's attempt to change the record on

---

[1] 1. If this court takes judicial notice of several volumes of state court documents as requested by appellee without such a showing, the burden would fall upon this court to review hundreds of state court motions and pleadings to determine whether appellant properly litigated issues in state court or improperly filed papers for purposes of delay.

appeal was untimely.

A copy of this letter was served by mail upon appellee.

In his letter of 22 July 1995, Horvath stated:

> "Appellee's attempt to Change the record on appeal after appellant filed his reply to the petition for rehearing should be denied upon the ground that appellee's request is very, very late.
>
> "Appellee was aware when it filed the petition for rehearing that the petition was grounded upon alleged facts outside of the record on appeal. (Petition for Rehearing, footnote 1.) At latest, appellee's attempt to correct the record problem should have been made when or shortly after the petition for rehearing was filed. A timely request would have allowed appellant an Opportunity to respond. Instead, appellee waited until shortly before appellant s reply to the petition was due on 28 July 1995 (and after it actually was filed) to submit improper documents for consideration by this court."

Although well aware of the issue, appellee's motion does address or attempt to justify making this request for judicial

notice so very late in the proceedings before this court.

4. IN ANY EVENT, APPELLEE'S MOTION TO LODGE ITS UNFILED STATEMENT OF THE CASE IN THE STATE PENALTY APPEAL SHOULD BE DENIED.

Appellee previously lodged as Item 11 a copy of its draft statement of the case in the state penalty appeal. This document has not been filed in the California Supreme Court and a copy thereof has not been served upon appellant or attorney Horvath.

In the present motion, appellee for the first time indicates that it wants this court to take judicial notice of the lodged documents. In support of this request, appellee says, "The official record of the parallel state case is a proper object for judicial notice on the appeal of an abstention order." (Motion, p. 2.)

Appellee's draft statement of the case upon penalty appeal is not a part of the official state record since it has not been filed in any court. Therefore judicial notice

of this document is improper upon the face of the argument urged by appellee.

Upon this additional ground, judicial notice of Item 11 is improper. This document should immediately be returned to appellee without consideration by the court.

If this court decides to take judicial notice of Item 11, appellee should be ordered immediately to serve a copy of its unfiled statement of the case upon appellant and attorney Horvath. Appellant is entitled to have a copy of the record on appeal, including any matter judicially noticed. Since appellee knew appellant and Horvath did not have a copy of this document appellee should have served this document upon appellant and his advisory counsel in the first instance.

CONCLUSION

Appellee's request that this court take judicial notice of previously lodged documents should be denied and the lodged documents should immediately be returned to appellee.

Appellant Richard Phillips respectfully so prays.

DATED: 27 July 1995

Respectfully submitted,

/s/
Donald J. Horvath
Advisory Counsel For
Appellant Phillips

DECLARATION OF SERVICE BY MAIL

Re: Richard Phillips v. Daniel Vasquez
No. 92-15828

I, Donald Horvath, declare that I am over 18 years of age and not a party to the within cause; my business address is 43033 Glacier Lane, Coarsegold, CA 93614. I served a true copy of the attached

OPPOSITION TO APPELLEE'S MOTION TO LODGE DOCUMENTS

on each of the following, by placing same in an envelope addressed respectively as follows:

Daniel E. Lungren, Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
Att: Edmund D. McMurry, Esq.

Mr. Richard Phillips
C-13707 5-E-71
San Quentin Prison
San Quentin, CA 94964

Each envelope was then, on July 27, 1995, sealed and deposited in the United States mail at Coarsegold, California, the county in which I am employed. with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 27 July 1995 at Coarsegold, California.

Donald J. Horvath

Supreme Court, U.S.
F I L E D
NOV 8 1995
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. 95-616

ARTHUR CALDERON, Warden of San Quentin State Prison, and
DANIEL E. LUNGREN, Attorney General of California, Petitioners,

v.

RICHARD LOUIS ARNOLD PHILLIPS, Respondent.

OPPOSITION TO WRIT OF CERTIORARI

RICHARD LOUIS ARNOLD PHILLIPS
pro se with advisory counsel
C-13707 3-E-111
San Quentin State Prison
San Quentin, CA 94964

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. 95-616

ARTHUR CALDERON, Warden of San Quentin State Prison, and DANIEL E. LUNGREN, Attorney General of California, Petitioners,

v.

RICHARD LOUIS ARNOLD PHILLIPS, Respondent.

1. PETITIONERS HAVE FAILED TO ESTABLISH THAT THIS CASE PRESENTS A FEDERAL ISSUE WHICH JUSTIFIES THIS COURT'S ATTENTION.

> "A petition for writ of certiorari will be granted only when there are special and important reasons therefor." (Supreme Court Rules, Rule 10.1.)

Petitioners attempt to show that this case merits the expenditure of this court's precious and limited resources by suggesting that the Ninth Circuit decision will result in a flood of capital inmates attempting to follow Respondent Phillips' lead by seeking federal review of the guilt adjudication in bifurcated cases while an appeal of a retrial as to penalty is still pending in state court. (Petition p. 11.)

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However, logic dictates that petitioners' prediction of a flood of federal litigation resulting from the lower court decision will not occur. The reason is simple--early federal review of the constitutional validity of state guilt adjudication in capital cases will expedite imposition of the death sentence.[1] Since few prisoners sentenced to death want to speed up their execution, it is probable that the vast majority of condemned prisoners will want to delay a federal attack upon their guilt adjudication for as long as possible, and, therefore, will delay such an attack until after the penalty litigation is final in state courts.

Petitioners also assert that the Ninth Circuit decision "is a significant affront to the comity traditionally afforded state court proceedings." (Petition, p. 11.) This is not true. The California courts have reviewed and rejected all of Phillips' attacks upon his guilt adjudication which he has raised in his federal habeas corpus petition. Therefore, federal review of guilt issues which are final in California courts does not in any manner interfere with the right or ability of California courts to first decide such issues.

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1. For example, Phillips' federal habeas corpus petition attacks only the constitutional validity of his guilt adjudication. The sooner proceedings upon this petition commence the sooner the federal proceedings related to guilt will end.

Petitioners presume Phillips will even desire to file further federal habeas corpus petitions attacking penalty issues for a different set of operative facts, at some unknown date in the distant future. Assuming *arguendo* Phillips should choose to do so, future federal habeas corpus petitions will be limited to an attack upon the death sentence. If Phillips lacks grounds

///

Comity considerations actually support a conclusion that federal courts should decide Phillips' guilt issues as soon as possible. If a federal court decides that Phillips is entitled to a new guilt trial, the California Supreme Court--a busy court which does not need any unnecessary work--will not have to decide whether Phillips was properly sentenced to death in his pending (or any future) automatic penalty appeal.

Finally, petitioners say the Ninth Circuit decision "actually rewards a defendant for delaying the resolution of the penalty retrial." (Petition p. 11.) However, petitioners do not explain how or why Phillips gains any advantage in either federal court or in the state courts from his alleged delay of the penalty retrial. Since the penalty issues pending in state court are completely different from the guilt issues Phillips has raised in federal court,[2] the fact that the penalty appeal is pending gives Phillips no apparent advantage in federal court and the pending federal habeas corpus petition gives Phillips no apparent advantage in state court.

---

for a federal attack upon his sentence, Phillips' case will be final in federal courts upon affirmance of his death sentence by the California Supreme Court.

Petitioners want to delay the start of the federal proceedings related to Phillips' guilt until after his death sentence has been affirmed by the California Supreme Court. This could be a very long delay. If Phillips' pending state penalty appeal is successful, there will be another penalty retrial, followed by another automatic penalty appeal. If the subsequent appeal is successful, there will be yet another penalty trial followed by yet another appeal. There is no way to determine when this process will end, but it easily could continue for many years. Under Petitioner's position the guilt issues from an unrelated set of operative facts must lay dormant.

2. The guilt trial attacked in Phillips' federal habeas corpus petition occurred in 1980. (Petitioner's Appendix M. p. 2, ¶ 2.) His second penalty

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On the other hand, petitioners allege "It is equally beyond dispute that delay is the hallmark of the defense..." in capital cases. These are inconsistent positions.

2. REGARDLESS OF THE DELAY IN STATE PROCEEDINGS, 28 U.S.C. SECTION 2254 GRANTS RESPONDENT PHILLIPS A STATUTORY RIGHT TO PROCEED UPON HIS FEDERAL HABEAS CORPUS PETITION.

Attorney Horvath urged in his reply to the Petition for Rehearing below:

> "Section 2254 subdivision (a) provides in relevant part that a district court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States." (Emphasis added.) Appellant [Phillips] has filed such a petition.
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> "Section 2254 subdivision (b) states an exception to the general rule--federal habeas corpus relief cannot be granted unless the petitioner has exhausted his state remedies upon the federal claims asserted. Appellant's habeas corpus petition pleads exhaustion of his state remedies upon all federal claims asserted. (Habeas Corpus Petition, p. 15, ¶ 11.) Therefore, the exception does not apply and appellant has a statutory right to proceed upon his federal petition.
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> "Appellee may, of course, take issue with this factual allegation and all other factual allegations made in appellant's habeas corpus petition in the district court. However, appellant's habeas corpus petition properly pleads a federal action authorized by statute; therefore, the district court erred in dismissing the petition.

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trial from which an automatic appeal is pending in state court occurred in 1991. (Petitioner's Appendix M, p. 21, ¶ 8.) Thus, the guilt trial attacked in federal court occurred 11 years before the second penalty trial. The two trials were before different juries; the appellate record of the two trials is not the same; the issues in the state penalty appeal are completely different from the guilt issues raised in federal court.

> "By enacting section 2254 and thereby granting appellant a right to proceed upon his federal petition, Congress has resolved all relevant jurisprudential concerns in appellant's favor. Unless the statute is held to be unconstitutional, federal courts are not free to disregard this statute by denying appellant his statutory right to proceed upon the instant habeas corpus petition." (Petitioner's Appendix X, pp. 14-16.)

This Court has not held section 2254 to be unconstitutional or ignored the statute's mandate. Rather, this high court has applied the statute according to its express terms by concluding that the only condition precedent to a federal habeas corpus petition is exhaustion of the claims made in such a petition. (*Rose v. Lundy*, 455 U.S. 509, 520 [Prisoners who submit mixed petitions "nevertheless are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of the claims."].)

The Ninth Circuit correctly concluded that *Rose v. Lundy* does not preclude Phillips' habeas corpus petition. (Petitioner's Appendix A, pp. 2804-2805.) Petitioners do not urge that the Ninth Circuit's conclusion is wrong.

The Ninth Circuit correctly concluded that the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) does not preclude Phillips' habeas corpus petition. (Petitioner's Appendix A, p. 5805.)

In their petition for certiorari, petitioners only attack upon the Ninth Circuit's analysis of the abstention issue is an assertion that the court erred in concluding that the guilt adjudication is final in state court.

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However, section 2254 requires only that the issues raised in a federal habeas corpus petition be exhausted (final) in state court. Upon the record before it, the Ninth Circuit did not err in concluding that the guilt issues raised in Phillips' federal habeas corpus petition are final in California courts.

Phillips alleged in his federal habeas corpus petition:

> "The judgment convicting petitioner [Phillips] of murder with special circumstances is final in California courts. Petitioner believes that he cannot obtain further review of the adjudication of guilt by either direct appeal of right or discretionary writ petition in California courts. (See, Declaration of attorney Donald Horvath, Exhibit 3, ¶ 6." (Petitioner's Appendix M. ¶ 11, pp. 21-22.)

The sworn declaration of attorney Donald Horvath directly supports the allegation quoted above. (Petitioner's Appendix X, p. 11.) Horvath's declaration is the only relevant evidence upon the exhaustion issue in the record on appeal before the Ninth Circuit.

Thus, Phillips has well-pleaded that he has exhausted his state remedies upon the guilt issues raised in his federal petition and the evidence before the Ninth Circuit fully supports its conclusion that such guilt issues are final in California courts.[3] Since the requirements of section 2254 have been met, the Ninth Circuit decision that Phillips is entitled to proceed upon his federal habeas corpus petition is correct.

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3. Petitioners' do not contend otherwise--their attack upon finality is not directed to the relevant issue of whether Phillips has exhausted his state remedies upon the issues raised in his federal habeas corpus petition.

If petitioners want to litigate the issue of whether Phillips has exhausted his state remedies upon the issues raised in his federal habeas

Petitioners contend that Phillips' guilt adjudication is not final in state court because there is a possibility that it may be overturned upon some ground different from the issues raised in the federal petition--such as a retroactive constitutional decision of this court. (Petition, pp. 23-24.)

The argument proves too much. Upon petitioner's view of finality, Phillips' guilt adjudication will not be final in state court until he is actually executed--until that time, there is a possibility that Phillips will benefit from a new retroactive constitutional decision of this court. If the possibility of a new retroactive decision prevents finality of a guilt adjudication as urged by petitioners, Phillips' guilt adjudication will never be final in state court and he never will be entitled to seek relief in federal court.

In any event, petitioners' argument is irrelevant. The federal law generally requires Phillips to first seek relief in state court and this law applies even after Phillips' penalty appeal has been decided (the time when petitioners apparently believe guilt issues in a bifurcated case are final in state court). Therefore, if this court should announce a new retroactive constitutional decisions which entitles Phillips to a new guilt trial after his penalty has been affirmed on appeal, Phillips would still have to exhaust his state remedies by filing a habeas corpus petition grounded upon that decision in state court. The same is true of any other guilt issues which have not been raised in the instant federal habeas corpus petition.

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corpus petition, they may do so in district court. The Ninth Circuit decision

There obviously is some possibility--however remote--that guilt issues could be pending in state and federal court at the same time.[4] However, such a speculative possibility is not a sufficient reason for federal courts to refuse to entertain the instant habeas corpus petition. If Phillips should in the future seek state relief from the guilt adjudication, a federal abstention issue would arise at that time.

Petitioners seriously misrepresent the possibility that Phillips will raise new guilt issues in the pending state penalty appeal. Petitioners say Phillips may raise guilt issues "that have not been raised in prior pleadings." (Petition, p. 24.) Actually, Phillips may raise only "guilt issues ground upon new facts not reasonably available to the defense at the time of the prior habeas corpus petitions." (Petitioner's Appendix Q, p. 3.) Petitioners have neglected to inform this court that Phillips' counsel on his state penalty appeal (Horvath) stated under oath that as of 22 September 1995 Horvath has discovered no such issues. (Declaration of Attorney Horvath, incorporated herein as Respondent's Exhibit A.) Horvath's declaration was attached to Phillips' Opposition for Stay of Mandate, and properly served upon petitioners.

(fn. 3 con't) expressly recognizes that petitioners may contest this factual allegation in district court. (Petitioner's Appendix A, p. 5808, fn. 4.) In attorney Horvath's reply to the petition for rehearing below, Phillips expressly recognized petitioners' right to litigate this, and all other factual issues framed in Phillips' habeas corpus petition, before the district court. (Petitioner's Appendix X, p. 15.)

4. If any further guilt issues are discovered they will most probably be yet further instances of prosecutorial misconduct, destruction of evidence, or ineffective assistance of counsel.

From the very beginning of this appeal, Phillips has urged that 28 U.S.C. § 2254 and *Rose v. Lundy*, 455 U.S. 509 are determinative of his right to proceed upon his federal habeas corpus petition. (Petitioner's Appendix Q, pp. 4-6, 11.) Petitioners have brought this case to our nation's highest court, but they still have not addressed Phillips' argument. With all due respect, petitioners should not waste this court's time unless they are prepared to say why section 2254 and *Rose v. Lundy* do not expressly, directly, and conclusively authorize Phillips to proceed upon his federal habeas corpus petition.

Petitioners complain about the Ninth Circuit's reliance upon the extraordinary delay in the state court proceedings to support its decision. In doing so, petitioners look a gift horse in the month. Section 2254 does not say Phillips may litigate exhausted claims in federal court only if the state courts take too long to decide his case.

The extraordinary delay portion of the Ninth Circuit opinion actually benefits petitioners because it imposes a limitation upon federal habeas corpus relief which is not stated in section 2254. This portion of the Ninth Circuit opinion substantially narrows its scope and precedential effect to cases which involve extraordinary delay. This is another reason why the flood of litigation predicted by petitioners will not occur and another reason why this court's intervention is not necessary.

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3. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT PHILLIPS' FEDERAL ATTACK UPON THE CONSTITUTIONAL VALIDITY OF HIS CONVICTION OF MURDER WITH SPECIAL CIRCUMSTANCES SHOULD NOT BE FURTHER DELAYED.

Phillips must prove the facts necessary to establish that his conviction in 1980 of murder with special circumstances is constitutionally invalid. (*Burkett v. Cunningham*, 826 F.2d 1208, 1218 (3rd Cir. 1987).) The operative facts already are 15 years old. If petitioners have their way, Phillips will be faced with the burden of proving facts at least 20 years old.

The resulting prejudice to Phillips from the past delay in proving the factual allegations of his federal habeas corpus petition is clear and compelling. Petitioners want to exacerbate the prejudicial effect of past delay by adding a substantial, unknown period of future delay before Phillips is allowed an opportunity to prove the factual issues raised in his federal petition.

Since Phillips urged in his first pleading below that additional delay will prejudice his ability to prove the factual allegations made in his federal habeas corpus petition, petitioners are aware of the problem.

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In his return to the Ninth Circuit's Order to Show Cause why the appeal should not be dismissed dated 30 December 1993, attorney Horvath argued:

> "A rule of law which requires that the penalty portion of petitioner's [Phillips] case finally be decided by California courts before he can make a federal habeas corpus attack upon the validity of the guilt adjudication long final in California courts would result in needless delay which would severely prejudice petitioner's ability to prove the factual allegations made in his federal habeas corpus petition. The crime was committed in 1977--sixteen years ago. Petitioner's guilt trial, the result of which he attacks upon various constitutional grounds in his federal petition, occurred in 1980--thirteen years ago.
>
> "It will take several years for the pending penalty appeal to be decided by the California Supreme Court. If petitioner's present death sentence is reversed on direct appeal, there will be yet another penalty trial and yet another automatic direct appeal. The process of penalty reversal and retrial could continue for a very long time.
>
> "Thus, if petitioner must wait for the penalty aspects of his case to be finally determined in state courts before he is allowed to attack the long final California guilt adjudication in federal court, he may be forced to litigate facts which occurred more than twenty years before the federal habeas corpus hearing! Witnesses die. Memories fade. Since petitioner has the burden of proving the constitutional defects in his 1980 guilt trial asserted in his federal petition, (*Burkett v. Cunningham*, 826 F.2d 1208, 1218 (3rd Cir. 1987) he is the party who will be prejudiced by the loss of material evidence when witnesses die or they no longer can remember what happened.[2]" (Petitioner's Appendix Q, pp. 8-10.)

However, petitioners don't address this issue in their petition for certiorari.

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Instead, petitioners talk about prejudice to Phillips at his second guilt trial, which prejudice would also exist if Phillips obtains a new guilt trial in federal court upon this habeas corpus petition. However, Phillips does not have the burden of proof in a second guilt trial and the factual issues at a second guilt trial will be completely different than the factual issues framed by Phillips' habeas corpus petition. The prejudice to Phillips from further delay in this federal writ proceedings is greater and more immediate than the prejudice at a future guilt trial.

The Ninth Circuit balanced the prejudice to Phillips from further delay in the federal writ proceedings against the relevant jurisprudential concerns and correctly concluded that the balance strongly weighed in favor of allowing Phillips to proceed in federal court now. (Petitioner's Appendix A, p. 5810.) This balance does NOT change upon a conclusion that Phillips was responsible for some of the past delay.

The issues presented by this case is whether Phillips must suffer additional prejudice from future delay! The cause of past delay simply is not relevant to this issue.

4. PETITIONERS HAVE FAILED TO SHOW THAT PHILLIPS IS RESPONSIBLE FOR THE PAST DELAYS IN THIS CASE.

Petitioner's position regarding the cause of past delay in this case is interesting, but very unfair.

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Petitioners apparently accept the idea that capital litigation takes time when they argue that there was not undue delay in state proceedings and the delay which did occur was not the fault of the state. Petitioners justify the time spent to extradite Phillips and to prosecute the first appeal by saying these things reasonably take time to accomplish. (Petition, pp. 27-28.)

However, petitioners refuse to acknowledge that Phillips also has a right to defend himself and the resulting litigation delay is equally justified.

Petitioners complain that Phillips filed habeas corpus petitions in state court. Petitioners conveniently forgot to mention there was no state habeas corpus petition filed in conjunction with Phillips' first automatic appeal--and that the California Supreme Court invited Phillips to address several issues via habeas corpus petition in their decision.

Phillips was required to exhaust his state remedies before seeking federal relief and cannot be faulted for doing what the law requires of him! Petitioners do not claim that any of the state habeas corpus petitions were frivolous or filed for purposes of delay.

No state court found that any of Phillips' state habeas corpus petitions were frivolous or filed for purposes of delay.

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Petitioners complain that Phillips waived trial dates and requested postponements of his retrial date. However, petitioners do not claim that there was not good cause for such postponements of the trial. Presumably, the trial court would have denied any request for a continuance which was not supported by a showing of good cause to do so.

Petitioners complain that Phillips changed counsel more than once. However, petitioners do not claim that there was not good cause for doing so. Presumably, the trial court would have denied any request to change counsel which was not supported by a showing of good cause to do so.

Petitioners complain that Phillips filed numerous motions. However, petitioners do not claim that such motions were frivolous or filed for purposes of delay. In fact, a substantial number of Phillips' motions were granted by the state trial court.

Petitioners complain that Phillips had the audacity to tape record the testimony at his penalty retrial. The tape recordings show that the court reporter made many transcription errors. However, petitioners do not deny that Phillips is entitled to an accurate record on appeal. Phillips did not hire the court reporter and is not responsible for the reporter's errors.[5] Phillips simply followed the example of many federal courts, who routinely record all court room activities. Phillips' submitted a motion to openly record all testimony. The trial court granted this motion. It also should be noted that the prosecutor in the penalty retrial did not object to Phillips' motion.

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5. In excess of 140 typewritten pages of errors in the retrial transcript.

In short, petitioners contend that any delay in state court proceedings which results from litigation which they initiate or desire is justified, but any delay which results from litigation which Phillips initiates or desires in unjustified "dilatory conduct." (Petition, p. 26.)

Petitioners contend they are not responsible for the delay in the Ninth Circuit proceedings in this case. (Petition, p. 27.) Phillips is not responsible for this delay either.

Petitioners blame Phillips for this delay by implying that the Ninth Circuit issued its Order to Show Cause because Phillips' advisory counsel Horvath failed to file the brief ordered by that court on 1 October 1992. (Petition, p. 7.) However, the reason attorney Horvath did not comply with the 1 October 1992 briefing order was his concern regarding the ethical propriety to do so, expressed in a letter to the court dated 16 October 1992[6] in which Horvath stated:

> "As counsel for Mr. Phillips, I do not believe I ethically can state a position or conclusion adverse to Mr. Phillips. It appears that the court may be asking for my independent analysis of the issue before it."

The Ninth Circuit's subsequent Order to Show Cause obviously was an attempt to cure this problem by seeking input from all parties.

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6. Since Horvath's 16 October 1992 letter to the Ninth Circuit involved other attorney-client matters, petitioners were not served a copy of this letter.

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CONCLUSION

The Ninth Circuit correctly concluded that Phillips legally is entitled to proceed upon his federal habeas corpus petition at this time. The decision below is intentionally very narrow, and, therefore will have minimal precedential effect upon other cases.

This case does not meet the requirements for certiorari because, as argued above, few condemned inmates will want to litigate guilt issues before they must do so.

Phillips urges this honorable court to ignore the personal attacks and posturing of Petitioners in their petition for writ of certiorari; and look to the sole question for which Certificate of Probable Cause issued:

> "(8) ...Is Petitioner [Phillips] precluded from federal review of guilt issues fully exhausted at the state level, while awaiting a second, unwaivable, automatic appeal in state court of unrelated penalty phase issues arising from a partial retrial?"

Phillips, with the excellent guidance and tutelage of advisory counsel Horvath, herein respectfully submits a response to writ of certiorari in compliance with Supreme Court Rule 15.1.

Having done so, I would be remiss if I did not speak to the closing of Justice Kleinfeld's concurring opinion: "I am puzzled why the sides are reversed in this case." (Petitioner's Appendix A, p. 5818.) Phillips stated to the Ninth Circuit in his Response to Motion for Rehearing (Petitioner's Appendix W, pp. 15-16.) and closes with reiterating the point again:

> "The state can only delay so long. Sooner or later they are going to have to face the music - Appellant [Phillips] caught Madera County officials with their hands dirty. (See writ before district court.)"

Therefore, the petition should be denied.

Respondent Richard Louis Arnold Phillips so prays.

DATED: 6 November 1995

Richard Louis Arnold Phillips
RICHARD LOUIS ARNOLD PHILLIPS
Proceeding *pro se*
with advisory counsel

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CERTIFICATE OF SERVICE

RICHARD L.A. PHILLIPS, Petitioner, vs. ARTHUR CALDERON, Warden Defendant.	)	Case No. 95-616

I, the undersigned, hereby certify that I am a citizen of the United States, that I am over the age of 18 years, and am a party to the within entitled action. My business/residence address is:

C-13707 3-E-111
San Quentin State Prison
San Quentin, CA 94964

I served a copy of the attached:

OPPOSITION TO WRIT OF CERTIORARI

upon the interested parties by placing a true and correct copy thereof in an envelope and sealing same, postpaid and by depositing same for delivery in the United States mail at San Quentin, California, per the restrictions of San Quentin State Prison, concerning inmate delivery to correctional authorities of outgoing legal mail, addressed as follows:

STATE ATTORNEY GENERAL
P.O. Box 944255
Sacramento, CA 94244

A. CALDERON, Warden
San Quentin State Prison
San Quentin, CA 94964

I declare under penalty of perjury that the foregoing is true and correct; and that this was executed on the 6th day of November 1995 in San Quentin, California.

Richard L.A. Phillips
RICHARD L.A. PHILLIPS
pro se with advisory counsel

DECLARATION OF ATTORNEY DONALD J. HORVATH

I, Donald J. Horvath, say:

1. I am an attorney at law licensed to practice in California. I was appointed advisory counsel for appellant Phillips in this action and was appointed to represent Phillips upon his pending direct appeal from imposition of a second death penalty in the California Supreme Court.

2. To date, I have not discovered any new habeas corpus guilt issues which are grounded upon facts not reasonably available to the defense at the time of the prior habeas petitions.

3. In my opinion, it is very unlikely that any new guilt issues exist which meet the very narrow requirements (stated in paragraph 2 above) for consideration by the California Supreme Court.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct, and that this declaration was executed on 22 September 1995 at Coarsegold, California.

Donald J. Horvath

EXHIBIT "A"

BEST AVAILABLE COPY